FILED

No. 94 223 AUG - 5 1994

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

PENNSYLVANIA PUBLIC UTILITY COMMISSION,
Petitioner,

vs.

SOUTHEASTERN PENNSYLVANIA
TRANSPORTATION AUTHORITY

Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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Dated: August 4, 1994

87 pp

STATEMENT OF QUESTIONS PRESENTED FOR REVIEW

Did the Court of Appeals err in affirming the District Court's exercise of jurisdiction over Southeastern Pennsylvania Transportation Authority's complaint against the Pennsylvania Public Utility Commission requesting injunctive relief pursuant to 45 U.S.C. 581(c)(5) which exempts certain commuter authorities from payment of state and local taxes where 28 U.S.C. §1341 bars suits in federal court enjoining collection of state taxes and the Eleventh Amendment bars suits against states in Federal Court?

Did the Court of Appeals err in affirming the District Court's decision to enjoin the Pennsylvania Public Utility Commission pursuant to 45 U.S.C. §581(c)(5), from directing Southeastern Pennsylvania Transportation Authority to maintain certain highway bridges where the Commission's orders are an exercise of the Commonwealth of Pennsylvania's police power which has not been preempted by an act of Congress?

LIST OF PARTIES

The parties to the proceedings below were the petitioner, Pennsylvania Public Utility Commission, and the respondent, Southeastern Pennsylvania Transportation Authority. Upper Gwynedd Township was a separate appellant in the Court below.

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vs.

SOUTHEASTERN PENNSYLVANIA TRANSPORTATION AUTHORITY

Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

---

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

The Pennsylvania Public Utility Commission, the Petitioner herein, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Third circuit entered in *SEPTA v. Pa. P.U.C.* on May 10, 1994.

REFERENCE TO OPINIONS DELIVERED IN THE COURTS BELOW

The Memorandum Opinion of the United States Court of Appeals for the Third Circuit in *SEPTA v. Pa. P.U.C.* is unreported and is reprinted in the Appendix to this Petition at 1a. The Opinions and Orders of the United States District Court for the Eastern District of Pennsylvania in *SEPTA v. Pa. P.U.C.* are reported at 802 F.Supp. 1273 and 826 F.Supp. 1506 and are reprinted in the Appendix to this Petition at 10a and 38a.

JURISDICTION

The Memorandum Opinion of the United States Court of Appeals for the Third Circuit in *SEPTA v. Pa. P.U.C.* affirming the opinions and orders of the United States District Court for the Eastern District of Pennsylvania was entered May 10, 1994. The jurisdiction of this Court to review the Memorandum Opinion of the United States Court of Appeals for the Third Circuit is invoked under 28 U.S.C. §1254(1).

STATUTES INVOLVED

The Statute at 45 U.S.C. §581(c)(5) states in pertinent part:

> Notwithstanding any other provision of law, any commuter authority that could have contracted with AMTRAK Commuter for the provision of commuter service but which elected to operate directly its own commuter service as of January 1, 1983, shall be exempt from the payment of any taxes or other fees to the same extent as the Corporation is exempt. Such exemption shall be effective as of October 1, 1981.

STATEMENT UNDER RULE 29.4(b)

Since the proceeding draws into question the constitutionality of 45 U.S.C. §581(c)(5), an Act of Congress affecting the public interest and neither the United States nor

any agency, officer or employee thereof is a party, it is noted that 28 U.S.C. §2403(a) may be applicable.

The United States Court of Appeals for the Third Circuit has, pursuant to 28 U.S.C. §2403(a), previously certified to the Attorney General of the United States the fact that the constitutionality of such Act of Congress has been drawn into question.

STATEMENT OF THE CASE

These cases began when the Pennsylvania Public Utility Commission (Commission), pursuant to its authority at 66 Pa. C.S. §2702 and §2704, instituted investigations regarding maintenance responsibility for various highway bridges at rail/highway crossings located within the Commonwealth of Pennsylvania. The Commission has exclusive authority in the Commonwealth to order the construction, reconstruction, alteration, repair, protection, suspension or abolition of rail/highway crossings, as well as the exclusive authority to determine and order which parties should perform such work at the crossings and which parties should maintain the crossings in the future, all to effectuate the prevention of accidents and to promote the safety of the public. *SEPTA v. Pa. P.U.C.*, 140 Pa. Comm. Ct. 270, 592 A.2d 797 (1991) *alloc. denied* 611 A.2d 714 (1992).

The Commission also has the exclusive authority in the Commonwealth to assess the costs of any work it orders upon the concerned parties to a proceeding in such proper proportions as the Commission may determine. 66 Pa. C.S. §2702(a). The Commission determines which entities are concerned parties within the meaning of 66 Pa. C.S. §2704(a) and §2702(c). *County of Chester v. Pa. P.U.C.*, 47 Pa. Comm. Ct. 366, 408 A.2d 552 (1979). Concerned parties include municipalities, counties, railroads, fixed utilities and the Pennsylvania Department of Transportation. In apportioning costs in rail/highway crossing cases, the Commission is not limited to any fixed rule but takes all relevant factors into consideration, the only requirement

being that its order be just and reasonable. *East Rockhill Township v. Pa. P.U.C.*, 115 Pa. Comm. Ct. 228, 540 A.2d 600 (1988).

These cases began in 1987 when the Commission initiated investigations into the safety of and maintenance responsibility for the Montgomery Avenue bridge, located in Lower Merion Township, Montgomery County; the Swedesford Road bridge, located in Upper Gwynedd Township, Montgomery County; the Johnson Street bridge, located in the City of Philadelphia; and the Willow Grove Avenue bridge, located in the City of Philadelphia. All of these bridges cross over facilities of Southeastern Pennsylvania Transportation Authority (SEPTA). At the time the Commission initiated these investigations, no concerned party would voluntarily assume maintenance responsibility for the bridges. In order to prevent accidents and promote safety, the Commission started these investigations to determine who should maintain the bridges. Administrative Law Judges (ALJs) of the Commission held hearings in four separate proceedings and issued Recommended Decisions which assigned SEPTA maintenance responsibilities for these bridges. Various parties, including SEPTA, filed Exceptions to the Recommended Decisions.

In its Exceptions, SEPTA contended that it was exempt from the Commission's maintenance assignments pursuant to 45 U.S.C. §581(c)(5) which exempts certain commuter authorities, including SEPTA, from state and local taxes. SEPTA contended that *National Railroad Passenger Corporation v. Pa. P.U.C.*, 665 F. Supp. 402 (E.D. Pa. 1987), *aff'd* 848 F.2d 436 (3rd Cir. 1988) *cert. denied* 488 U.S. 893 (1988), which ruled that Commission maintenance assignments to AMTRAK were taxes barred by 45 U.S.C. §546b, applied to Commission maintenance assignments to SEPTA and that such maintenance assignments were barred by 45 U.S.C. 581(c)(5).

The Commission, bound by the Commonwealth Court of Pennsylvania's ruling in *SEPTA v. Pa. P.U.C.*, 140 Pa. Comm. Ct. 270, 592 A.2d 797 (1991), *alloc. denied* 611 A.2d

714 (1992), that 45 U.S.C. §581(c)(5) did not prohibit the Commission from imposing maintenance responsibilities on SEPTA, rejected SEPTA's arguments and with some modifications, adopted the Recommended Decisions of the ALJs. The Commission directed SEPTA to maintain the substructure and superstructure of the bridges carrying Swedesford Road, Johnson Street and Willow Grove Avenue over SEPTA facilities and ordered Upper Gwynedd Township and the City of Philadelphia to maintain the road surface on the bridges located in their respective municipalities. The Commission found that SEPTA owned the bridges carrying Swedesford Road, Johnson Street and Willow Grove Avenue over its facilities. The Commission also directed SEPTA to maintain the portion of the Montgomery Avenue bridge below the exterior of the bridge's arch, the adjacent sidewalks and SEPTA's facilities at the crossing itself and ordered Lower Merion Township to perform annual inspections of the Montgomery Avenue bridge as well as maintain the balance of the structure.

In reaching its decision as to what entity should maintain these structures, the Commission found that both SEPTA and the municipalities benefitted from the grade-separated crossings. The Commission also found that various predecessor railroads to SEPTA had previously maintained portions of the bridges.

After the Commission's orders were entered, SEPTA filed complaints against the Commission, Upper Gwynedd Township and Lower Merion Township in the United States District Court for the Eastern District of Pennsylvania requesting declaratory and injunctive relief. The complaints alleged that the Commission orders were taxes such as were forbidden by 45 U.S.C. §581(c)(5) and 45 U.S.C. §546b. The District Court entered an order on August 20, 1992 consolidating the cases. The Commission, Upper Gwynedd Township and Lower Merion Township filed motions to dismiss the complaints asserting lack of subject matter jurisdiction pursuant to 28 U.S.C. §1341 and the Eleventh Amendment. The District Court rejected

these arguments and by order and opinion entered October 1, 1992 denied the parties' motions to dismiss. *SEPTA v. Pa. P.U.C.*, 802 F. Supp. 1273 (E.D. Pa. 1992).

The Commission, Upper Gwynedd Township and Lower Merion Township filed answers to the complaints admitting their factual allegations but denying the legal conclusions set forth in SEPTA's complaints. The Commission also raised the affirmative defenses that the statute at 45 U.S.C. §581(c)(5) was unconstitutional and that the District Court should abstain from exerting jurisdiction in the matter.

The Commission, SEPTA, Lower Merion Township and Upper Gwynedd Township filed motions for summary judgment. The District Court, by order and opinion entered July 1, 1993 granted SEPTA's Motion for Summary Judgment and denied the Commission's, Lower Merion Township's and Upper Gwynedd Township's Motions for Summary Judgment. *SEPTA v. Pa. P.U.C.*, 826 F. Supp. 1506 (E.D. Pa. 1993).

On July 30, 1993, the Commission and Upper Gwynedd Township appealed to the United States Court of Appeals for the Third Circuit. The Commission and Upper Gwynedd Township contended that the District Court's rulings constituted legal error in that the Commission's maintenance assignments were not taxes, alternatively that the District Court lacked subject matter jurisdiction pursuant to 28 U.S.C. §1341, that the Court should abstain from exercising its jurisdiction and that 45 U.S.C. §581(c)(5) was unconstitutional.

The United States Court of Appeals for the Third Circuit, in an unpublished opinion filed May 10, 1994, adopted the District Court's opinions on the issues of whether the maintenance responsibilities assigned to SEPTA were a tax, the jurisdictional challenges based on abstention and the Eleventh Amendment, and the Constitutional challenges based on the Commerce Clause and Tenth Amendment.

Regarding the jurisdictional challenge based on 28

U.S.C. §1341, the Court of Appeals adopted the rationale of the District Court and stated that the language in 45 U.S.C. §581(c)(5) provided a clear and manifest statement of Congress' intent to partially repeal 28 U.S.C. §1341.

REASONS FOR GRANTING THE WRIT

I

Certiorari Should Be Granted To Resolve A Conflict Between The Court Of Appeals' Decision And A Previous Decision Of The Commonwealth Court Of Pennsylvania That 45 U.S.C. §581(c)(5) Does Not Exempt SEPTA From Commission Assigned Maintenance Obligations at rail/highway crossings.

The states in the exercise of their police power have the authority to regulate rail/highway crossings. The states may, pursuant to that police power, direct railroads to perform work and bear costs at rail/highway crossings, including costs of construction and maintenance. In a series of decisions at the turn of the century, this Court found that the states' exercise of this power over rail/highway crossings was constitutional. *Chicago, Burlington and Quincy Railroad Company v. Chicago,* 166 U.S. 226 (1897) (costs of construction and maintenance of new at-grade crossings); *New York and New England Railroad Company v. Bristol,* 151 U.S. 556 (1894) (costs of construction and maintenance of new grade-separated crossings); *Chicago, Burlington and Quincy Railroad Company v. Nebraska*, 170 U.S. 57 (1898) (costs of maintenance of highway bridge); *Cincinnati, Indianapolis and Western Railway Company v. Connorsville,* 218 U.S. 1060 (1910) (costs of constructing railroad bridge over highway).

A state may order work performed at rail/highway crossings in order to promote the safety of the public. *Erie Railroad Company v. Public Utility Commissioners,* 254 U.S. 394 (1921). This Court has held that, unlike improvements to streets, sewers or water systems, the costs of improvements at rail/highway crossings may be assigned

to a railroad without regard to benefit received by the railroad from the project. *Atchison, Topeka and Santa Fe Railway Company v. Public Utility Commission of California, 346 U.S. 346 (1953).* Rather, this Court held that improvements at rail/highway crossings are instituted by the state for safety reasons and that the state in exercising its police powers may order railroads to pay the entire cost of those improvements.

The Commonwealth of Pennsylvania has delegated its authority over rail/highway crossings to the Pennsylvania Public Utility Commission, which acts as an arm of the legislature. *Lacy v. East Broadtop Railroad and Coal Company,* 108 Pa. Super. 351, 77 A.2d 706 (1955); *Commonwealth Ex. rel. v. Benn,* 284 Pa. 421, 131 A. 253 (1925). At the time of the Commission's hearings on these matters, the Commission's authority, pursuant to state law, to allocate costs at rail/highway crossings to SEPTA had been affirmed by the decisions in *SEPTA v. Pa. P.U.C.,* 140 Pa. Comm. Ct. 270, 592 A.2d 797 (1991), *alloc. denied* 611 A.2d 714 (1992) and *SEPTA v. Pa. P.U.C.,* 140 Pa. Comm. Ct. 292, 592 A.2d 808 (1991), *alloc. denied* 611 A.2d 714 (1992). In those decisions, the Commonwealth Court of Pennsylvania ruled that Commission maintenance assignments were not taxes and the Commission was not barred by 45 U.S.C. §581(c)(5) from assigning maintenance responsibilities to SEPTA.

Rather, the Commonwealth Court stated that the Commission was empowered to settle disputes among parties obligated to maintain the crossings as well as order improvements and enforce maintenance obligations already assigned. After reviewing the Commission's authority at rail/highway crossings, the Commonwealth Court ruled that Commission maintenance assignments were not taxes and cited this Court's decision in *National Cable Television Association v. United States,* 415 U.S. 336 (1974), and the decision of United States Court of Appeals for the Second Circuit in *National Railroad Passenger Corporation v. New York,* 882 F.2d 710 (2nd Cir. 1989). The Commonwealth Court noted that Commission mainte-

nance assignments were not special assessments either and disagreed with the decision in *National Railroad Passenger Corporation v. Pa. P.U.C.*, 665 F. Supp. 402 (E.D. Pa. 1987), *aff'd* 848 F.2d 436 (3rd Cir. 1988), *cert. denied* 488 U.S. 893 (1988). The Commonwealth Court noted that special assessments are imposed for improvements which benefit property. Conversely, if the property does not receive a benefit from the improvement, a special assessment can not be imposed. The Commonwealth Court concluded that the Commission did not impose new responsibilities on parties at rail/highway crossings but only required parties to perform responsibilities the parties would have pursuant to common law or statute if the Commission did not exist.

The Commonwealth Court's rationale is consistent with this Court's statement in *Atchison, Topeka and Santa Fe Railroad Company v. P.U.C. of California,* 346 U.S. 346 (1953), that state ordered maintenance at a rail/highway crossing is not the same as an assessment for an improvement which enhances the value of property but is assigned in order to further the safety and convenience of the public. Since the Commonwealth Court concluded Commission ordered maintenance at a rail/highway crossing is not a tax, it found that 45 U.S.C. §581(c)(5) did not exempt SEPTA from Commission maintenance assignments.

The Court of Appeals' memorandum opinion affirming the District Court's ruling in these cases conflicts with the Commonwealth Court's rulings both in finding that Commission imposed maintenance obligations are taxes and that 45 U.S.C. §581(c)(5) exempts SEPTA from those assignments. The Court of Appeals and District Court opinions recognize that their respective rulings conflict with the Commonwealth Court's previous rulings. (Appendix 4a-5a, 17a, 44a)

The Court of Appeals and the District Court ruled that the Commission's maintenance assignments to SEPTA in these cases are a tax. Both Courts followed the decision in *National Railroad Passenger Corporation v. Pa. P.U.C.*, 665 F. Supp. 402 (E.D. Pa. 1987) *aff'ed* 848 F.2d 436 (3rd Cir.

1988), *cert. denied* 488 U.S. 893 (1988) (Amtrak). That decision stated that the Commission's assignment of costs at a rail/highway crossing was a tax on the National Railroad Passenger Corporation *(Amtrak).* The Courts in *Amtrak* asserted that the Commission's cost allocations were similar to special assessments for streets, sidewalks and sewers, *see Amtrak* 848 F.2d 436, 438. The Court in *Amtrak* also stated that the fact that the Commission's cost allocations where based on its exercise of the Commonwealth's police power not its taxing power was of "no moment", *see Amtrak* 848 F.2d 436, 437

The District Court's and Court of Appeals' opinions in these cases expressly disagreed with the Commonwealth Court's decision and, following the *Amtrak* decision, stated that there was no distinction between a general tax and special assessments. (Appendix 17a-18a). The District Court concluded and the Court of Appeals affirmed that 45 U.S.C. §581(c)(5) prohibits the Commission from assigning maintenance responsibility to SEPTA just as 45 U.S.C. 546b prohibits the Commission from assigning maintenance responsibility to Amtrak. (Appendix 62a-64a)

The Court of Appeals and District Court's rulings in these cases are contrary not only to the Commonwealth Court's rulings but also to the prior ruling of this Court in *Atchison, Topeka and Santa Fe Railroad Company v. P.U.C. of California,* 346 U.S. 346 (1953), where this Court ruled that state directed maintenance at rail/highway crossings was not the same as a special assessment. Even assuming the Court of Appeals and District Court are correct in these cases that there is no difference between a general tax and special assessment, this Court has ruled that state ordered maintenance at a rail/highway crossing is not a special assessment.

The result of the Court of Appeals' ruling in these cases is that the Commission is now in a position where it must either obey the ruling of the Commonwealth Court of Pennsylvania or the ruling of the District Court and Court of Appeals in determining whether it can assign SEPTA maintenance responsibilities at rail/highway crossings. If

the Commission follows the Commonwealth Court's ruling as it did in these cases, and assigns SEPTA maintenance responsibilities, SEPTA will turn to the District Court to seek injunctive relief. If the Commission follows the District Court and rules that it has no authority to assign maintenance to SEPTA, other parties to the Commission action will appeal to Commonwealth Court claiming the Commission's order is legal error. Under these circumstances, there is simply no way that the Commission can rule correctly in cases where maintenance responsibility at SEPTA rail/highway crossings is at issue.

This Honorable Court should review the decision in these cases in order to resolve the dispute between the rulings of the Court of Appeals and the Commonwealth Court over whether the Commission can direct SEPTA to maintain facilities at rail/highway crossings. The conflict between the Commonwealth Court and Court of Appeals decisions promotes lack of finality in Commission decisions and uncertainty in interpreting a federal statute. The Court of Appeals' decision substantially disrupts the Commission's ability to regulate over five hundred (500) SEPTA rail/highway crossings and jeopardizes safety at those crossings. For these reasons, this Court should review the Court of Appeals' decision.

II

The Court of Appeals' Decision That 45 U.S.C. §581(c)(5) Exempts SEPTA From Commission Assigned Maintenance Obligations Renders The Statute An Unconstitutional Exercise Of The Commerce Power By Congress Violative Of The Tenth Amendment And Conflicts With Prior Decisions Of This Court.

In its June 29, 1993 Opinion and Order, as affirmed by the Court of Appeals, the District Court found that 45 U.S.C. §581(c)(5) was a constitutional exercise of the Commerce Power and not violative of the Tenth Amendment. (Appendix 44a-55a) The Commission believes

that the statute, as interpreted by the Court of Appeals, interferes with the Commission's authority over SEPTA, compels the Commission to regulate SEPTA pursuant to Federal directive and exceeds congressional authority.

The District Court reasoned that it must only determine whether Congress acted rationally in adopting the statute and that the means chosen were reasonably adapted to the end permitted by the Constitution and cited *Hodel v. Virginia Surface Mining and Reclamation Association,* 452 U.S. 264 (1981). (Appendix 45a-46a) The Court stated that no explicit finding that the regulated activity affects interstate commerce was necessary, citing *Katzenbach v. McClung,* 379 U.S. 294 (1964), and observed that congressional intent could be gleaned from the legislative history of 45 U.S.C. §546b and "the clear import of §581(c)(5) itself. (Appendix 45a-46a) The District Court then stated that 45 U.S.C. §581(c)(5) was a reasonable method of facilitating interstate commerce. The District Court's reasoning misinterprets both of the above-cited rulings of this Court.

In this case, there are no findings at 45 U.S.C. §501, which indicate what purpose Congress had in enacting 45 U.S.C. §581(c)(5). The statute at 45 U.S.C. §501 gives reasons for creating AMTRAK and AMTRAK Commuter Services and exempting them from state and local taxes, not for exempting state created commuter authorities from state and local taxes. Congress has made no findings in the legislation that local commuter authorities affect Commerce or that exempting commuter authorities from state and local taxes promotes any federal purpose. To the contrary, 45 U.S.C. §501(c)(2) specifically states that commuter authorities which choose not to contract with AMTRAK Commuter are part of the governmental functions of the states.

What is missing in 45 U.S.C. §581 (c)(5) which was present in the statute under consideration in *Katzenbach v. McClung is* legislative history which would provide the basis for finding that the regulated activity affects interstate commerce. *Katzenbach v. McClung* was a ruling on

the Civil Rights Act of 1964 which had an extensive legislative history, including congressional reports and testimony. This Court cited the legislature history of that act as providing rationale for Congressional action. Here, there is no legislative history, congressional report or testimony regarding the enactment of 45 U.S.C. §581(c)(5) which provides any rationale for exempting state created commuter authorities from state and local taxes. In order to make up for this deficiency, the District Court cites the extensive legislative history of 45 U.S.C. §546b which says a great deal about exempting AMTRAK from state and local taxes but nothing about exempting SEPTA or other state created commuter authorities from state and local taxes.

In the absence of some explanation either in the legislation itself or the legislative history of 45 U.S.C. §581(c)(5) as to how exempting state created commuter authorities affects interstate commerce, it is impossible to determine Congress' reason for enacting the statute. If there is no way to determine the reason why Congress enacted the legislation, one cannot determine whether Congress acted rationally when it enacted the legislation.

Furthermore, the means selected by Congress in enacting 45 U.S.C. §581(c)(5) are not reasonably adapted to the end sought to be achieved. Congress' only possible purpose in enacting 45 U.S.C. §581(c)(5) would be to reduce federal funds expended on SEPTA and other state created commuter authorities yet to insure their continued existence and financial viability. These were the reasons that Congress gave for enacting 45 U.S.C. §546b. However, federal funding for SEPTA and other commuter authorities has been reduced steadily even prior to the passage of 45 U.S.C. §581(c)(5). If federal funding were eliminated entirely, the exemption contained in 45 U.S.C. §581(c)(5) would still exist and serve no federal purpose.

In contrast to AMTRAK, SEPTA receives the majority of its funding from the Commonwealth of Pennsylvania and the counties in its service area, not the federal government. If federal funding of SEPTA were eliminated entirely, SEPTA could remain financially viable with additional

Commonwealth and county funding. Therefore, the means chosen by Congress in passing 45 U.S.C. §581(c)(5) to achieve its presumed purpose of reducing federal funds expended on SEPTA while insuring its continued viability is not reasonably adapted to achieve those ends.

In its June 29, 1993 Opinion and Order, as affirmed by the Court of Appeals, the District Court concluded that 45 U.S.C. §581(c)(5) did not violate the Tenth Amendment of the United States Constitution because Congress is not commandeering the state regulatory process and because Congress' power to protect interstate rail transportation against state regulation is so complete that the Tenth Amendment does not work to invalidate 45 U.S.C. §581(c)(5). (Appendix 50a-51a) The District Court states that this Court's decision in *New York v. U.S.*, _____ *U.S.* _____, 112 S. Ct. 2408 (1992), is not applicable because 45 U.S.C. §581(c)(5) does not compel the Commission to require or prohibit acts but merely directs the state to refrain from engaging in certain forms of regulation.

In the *New York* case, this Court stated that Congress may regulate directly and preempt contrary state regulation but may not compel states to regulate pursuant to federal direction. This Court noted that the Commerce Clause does not allow Congress to regulate state government's regulation of interstate commerce. This Court stated that Congress may use a variety of methods other than direct coercion to urge states to adopt a legislative program consistent with federal interests. In particular, this Court noted that Congress could attach conditions to the receipt of federal funds or preempt state law by federal regulation.

In these cases, the Commonwealth of Pennsylvania has already established legislation which exempts SEPTA from state and local taxation pursuant to 74 P.S. §1542 but also makes SEPTA subject to Commission jurisdiction and cost allocations by expanding the definition of "public utility" in 66 Pa. C.S. 102. *SEPTA v. Pa. P.U.C.*, 140 Pa. Comm. Ct. 270, 592 A.2d 797 (1991), *alloc. denied* 611 A.2d 714 (1992). Here, the Commission is being directed to implement Congressional regulation of SEPTA and exempt SEPTA

from the Commission's authority to allocate costs and maintenance responsibilities at rail/highway crossings. Congress has neither directly preempted the Commission's authority at rail/highway crossings nor attached conditions on the federal funds received by the Commonwealth for SEPTA but has coerced the Commission to regulate pursuant to federal direction. For these reasons, this Court should review the Court of Appeals' decision.

III

The Court Of Appeals' Decision Affirming The District Court's Determination That It Has Jurisdiction Over The Subject Matter Of SEPTA's Complaints Misinterprets The Prior Decisions Of This Court.

The Court of Appeals adopted the District Court's opinion that the Tax Injunction Act, 28 U.S.C. §1341, and Eleventh Amendment do not bar that Court's jurisdiction. The District Court found and the Court of Appeals affirmed that the Tax Injunction Act did not bar jurisdiction, stating "magic words" specifically abrogating the Tax Injunction Act were not necessary and noting that this would require an unrealistic linguistic precision from the legislative process. (Appendix 5a-7a) The Court of Appeals notes in addition that the phrase in 45 U.S.C. §581(c)(5) that it is "notwithstanding any other provision of law" refers to the Tax Injunction Act at 28 U.S.C. §1341 and acts as a waiver to that statute. (Appendix 8a)

This rationale misconstrues prior decisions of this Court. This Court has repeatedly required that congressional intent to enact partial repeal of a statute must be "clear and manifest" *Kremer v. Chemical Construction Corporation,* 456 U.S. 461 (1982). The statute at 45 U.S.C. §581(c)(5) does not display "clear and manifest" congressional intent to partially repeal 28 U.S.C. §1341. There is no language in 45 U.S.C. §581(c)(5) as is found in 45 U.S.C. §546b which specifically repeals 28 U.S.C. §1341. It is worth noting that 45 U.S.C. §546b contains language specifically repealing 28 U.S.C. §1341 even though it also

contains the "notwithstanding any other provision of law" language found in 45 U.S.C. 581(c)(5). There is nothing in the legislative history of 45 U.S.C. §581(c)(5) to indicate that Congress intended to repeal the provisions of 28 U.S.C. 1341 when it enacted 45 U.S.C. §581(c)(5). In the absence of either express statutory language or legislative history, the Court of Appeals and the District Court erred in finding 45 U.S.C. §581(c)(5) was a clear and manifest expression of congressional intent to repeal 28 U.S.C. §1341.

The Court of Appeals erred also in finding that the Eleventh Amendment did not bar the District Court's jurisdiction. The District Court in this case ruled and the Court of Appeals affirmed that the language of 45 U.S.C. §581(c)(5) and the Court's finding that it had the right to enforce the statute indicated Congressional intent to subject states to suit in federal courts. (Appendix 28a-29a)

This Court has required that the language of a statute be clear that Congress intends to abrogate the immunity provided in the Eleventh Amendment. *Atascadero State Hospital v. Scanlon,* 473 U.S. 234 (1985). The language of 45 U.S.C. §581(c)(5) does not state that SEPTA may pursue its remedies in federal court. Absent language stating this, 45 U.S.C. §581(c)(5) is not clear that Congress intended to abrogate the Eleventh Amendment. For these reasons, this Court should review the Court of Appeals' decision.

CONCLUSION

For the reasons set forth above, this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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Dated: August 4, 1994

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 93-1742

SOUTHEASTERN PENNSYLVANIA TRANSPORTATION AUTHORITY

v.

PENNSYLVANIA PUBLIC UTILITY COMMISSION; TOWNSHIP OF UPPER GWYNEDD

Township of Upper Gwynedd,

Appellant

No. 93-1746

SOUTHEASTERN PENNSYLVANIA TRANSPORTATION AUTHORITY

v.

PENNSYLVANIA PUBLIC UTILITY COMMISSION; TOWNSHIP OF LOWER MERION

(D. C. Civil No. 92-00112)

SOUTHEASTERN PENNSYLVANIA TRANSPORTATION AUTHORITY

v.

PENNSYLVANIA PUBLIC UTILITY COMMISSION; TOWNSHIP OF UPPER GWYNEDD

(D. C. Civil No. 92—01029)

SOUTHEASTERN PENNSYLVANIA
TRANSPORTATION AUTHORITY
v.
PENNSYLVANIA PUBLIC UTILITY COMMISSION
(D. C. Civil No. 92-03793)

Pennsylvania Public Utility Commission,
Appellant

On Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D. C. Civil Nos. 92-00112, 92-01029, 92-03793)
District Judge: Hon. Louis H. Pollak

Argued February 28, 1994

Before: SLOVITER, *Chief Judge,*
ALITO, *Circuit Judge,* and ROBINSON*, *District Judge*

(Filed MAY 10 1994)

MEMORANDUM OPINION OF THE COURT

SLOVITER, *Chief Judge.*

In these consolidated appeals, appellant-defendants Pennsylvania Public Utility Commission (PUC) and the Township of Upper Gwynedd challenge the district court's order that the Southeastern Pennsylvania Transit Authority (SEPTA) is immune from assessments intended to pay for the maintenance and upkeep of highways which run over its railroad tracks by virtue of 45 U.S.C. §581(c)(5) (1988). Because we agree with resolution of all the issues presented in the district court's thoughtful opinions, we affirm.

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*Hon. Sue L. Robinson, United States District Judge for the District of Delaware, sitting by designation.

I.
FACTS AND PROCEDURAL HISTORY

This case is the latest in a series of attempts by the PUC to impose maintenance costs on railroads for bridges which were built above railroad tracks used by that railroad. The district court reviewed in great detail the factual and procedural history of this case and we refer to its opinions for a more specific recounting of the facts.

Beginning in 1981 Congress exempted Amtrak from all state and local taxes pursuant to 45 U.S.C. §546b (1988):

> Notwithstanding any other provision of law, [Amtrak] shall be exempt from any taxes or other fees imposed by any State, political subdivision of a state, or local taxing authority which are levied on [Amtrak], or any railroad subsidiary thereof, from and after October 1, 1981 . . . . Notwithstanding the provision of section 1341 of Title 28, the United States district courts shall have original jurisdiction over any civil actions brought by the Corporation to enforce the exemption conferred hereunder and may grant equitable or declaratory relief as requested by [Amtrak].

We interpreted this section in *National R.R. Passenger Corp. v. Pennsylvania PUC,* 848 F.2d 436, 438 (3d Cir.), *cert. denied,* 488 U.S. 893 (1988) *(Amtrak I),* to prohibit the PUC from imposing a special assessment on Amtrak to maintain a highway-bridge over one of its tracks. Reviewing the legislative history and policy rationales, we determined that Amtrak's immunity should be construed broadly and that the assessments were within the scope of the provision's prohibition.

Meanwhile, in 1988 Congress had passed another statute which provided that

> Notwithstanding any other provision of law, any commuter authority that could have contracted with Amtrak Commuter for the provision of commuter service but which elected to operate directly its own commuter service as of January 1, 1983, shall be exempt

> from the payment of any taxes or other fees *to the same extent as [Amtrak]* is exempt. Such exemption shall be effective as of October 1, 1981.

45 U.S.C. 581(c)(5) (1988) (emphasis added).

When PUC attempted to impose special assessments on SEPTA for highway-bridges, SEPTA claimed the protection of section 581(c)(5) in state court proceedings. The state court rejected SEPTA's claim and, declining to follow the import of our holding in *Amtrak I,* held that such special assessments were not prohibited under section 581(c)(5). *See SEPTA v. Pennsylvania PUC,* 592 A.2d 797 (Pa. Commwlth 1991), *appeal denied,* 611 A.2d 714 (Pa. 1992) *(SEPTA I) SEPTA v. Pennsylvania PUC,* 592 A.2d 808 (Pa. Commwlth 1991), *appeal denied,* 611 A.2d 714 (Pa. 1992) *(SEPTA II).*

Following the holdings in *SEPTA I* and *II,* PUC imposed on SEPTA special assessments for maintenance responsibilities for four bridges which it owns and operates railway lines beneath. SEPTA filed this suit in federal court against PUC and the Townships of Upper Gwynedd and Lower Merion, both of which share maintenance costs with SEPTA over these bridges, claiming the assessments were prohibited by section 581(c)(5). Defendants moved to dismiss the action, claiming that the district court did not have jurisdiction, based both on the Tax Injunction Act and the Eleventh Amendment. The district court rejected these claims. *See SEPTA v. Pennsylvania PUC,* 802 F. Supp. 1273 (E.D. Pa. 1992) (SEPTA III). Both parties then moved for summary judgment, and the district court granted SEPTA's motion and permanently enjoined the defendants from enforcing the assessments or making new assessments on SEPTA for these bridges. *See SEPTA v. Pennsylvania PUC,* 826 F. Supp. 1506 (E.D. Pa. 1993) *(SEPTA IV).* PUC and Upper Gwynedd filed these timely appeals.

II.

DISCUSSION

After reviewing the parties' briefs and arguments, we find the district court's two opinions referred to above to be persuasive. Therefore we will adopt as our own the district court's discussion on the two merits-based challenges raised by Upper Gwynedd,[1] the jurisdictional challenges based on *Burford* abstention and the Eleventh Amendment, and the constitutional challenges to Congress's power to enact section 581(c)(5) based on the Commerce Clause and Tenth Amendment. *See SEPTA III*, 802 F. Supp. at 1285-86 *SEPTA IV*, 826 F. Supp. at 1512-26.

The most difficult issue facing the district court, and the question we asked the parties to focus upon in oral argument, is whether SEPTA's suits were barred from federal court by the Tax Injunction Act (TIA), 28 U.S.C. §1341 (1988). The TIA provides that the "district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State." The TIA deprives the federal courts of subject matter jurisdiction. *See Behe v. Chester County Bd. of Assessment Appeals,* 952 F.2d 66, 68 (3d Cir. 1991).

We recognize that Congress' intent to enact a partial repeal of the TIA "must be clear and manifest." *Kremer v. Chemical Constr. Corp.*, 456 U.S. 461, 468 (1982): *see Bank of New England Old Colony. N.A. v. Clark,* 986 F.2d 600, 603 (1st Cir. 1993) ("[A party] must show that congress

[1]Upper Gwynedd makes two arguments why the holding in *Amtrak I* is not conclusive on the merits. First, it argues that because SEPTA owned one of the highway bridges, imposing maintenance fees for its upkeep is not a tax. Upper Gwynedd Br. at 6-8. Second, it argues that SEPTA owned one of the highway bridges, imposing maintenance fees for its upkeep is not a tax. Upper Gwynedd Br. at 6-8. Second, it argues that SEPTA is not immune from tax because it is not a "commuter authority that could have contracted with Amtrak Commuter for the provision of commuter service" as required by section 581(c)(5). Upper Gwynedd Br. at 8-10.

clearly and manifestly intended the statute to be an exception to the [Tax Injunction] Act.") *Blangeres v. Burlington Northern, Inc.*, 872 F.2d 327, 328 (9th Cir. 1989) (per curiam) ("We will not carve out exceptions to the Tax Injunction Act unless Congress clearly expresses an intent to create an exception."). But in this case, we find that the circumstances articulated by the district court meet this high standard.

The district court rejected a "magic words" requirement for finding an exception to the TIA, noting that "precluding the shorthand method of incorporation as well as the obvious, but implicit, repeal—would be to expect an unrealistic linguistic precision in the legislative process." *SEPTA III*, 802 F. Supp. at 1282. The court noted that "it is impossible to make sense of §581(c)(5) without reference to §546(b)—because the former is designed to replicate the latter" and then reasoned that

> [i]t makes no sense to conclude that Congress designed §581(c)(5) to be enforced exclusively in the state courts. That provision does not merely confer federal tax immunity upon commuter authorities; it confers upon any commuter authority that could have contracted with Amtrak for local rail service the same favored tax position as Amtrak so that such an entity is not penalized by its decision to operate commuter rail service directly. It would be manifestly inconsistent with that design to limit SEPTA's legal remedies to state courts, which might, as has proven true here more narrowly construe the federal tax immunity.

Id. at 1282, 1284.

The court went on to conclude that the policies underlying the TIA were not hindered by reading section 58l(c)(5) as an exception.

> §1341 is designed to preserve from judicial interference "the imperative need of a State to administer its own fiscal operations," *Tully v. Griffin*, 429 U.S. 68, 73 (1976), but here Congress itself has denied fiscal autonomy insofar as the state seeks to impose certain

taxes on commuter authorities. The existence of a federally-created tax immunity distinguishes the case at bar from situations where the courts have refused to imply exceptions to §1341 based on the mere existence of a general federal right of action or a general jurisdictional statute that does not specifically pertain to state taxation. Where congressional interference with state fiscal autonomy is so clear and unequivocal, particular concern about federal *judicial* interference with state revenue collection is less justified.

Additionally, whereas state revenue collection would be seriously interrupted if any taxpayer with a plausible §1983 claim or any pensioner with a tax grievance could sue in federal court, §581(c)(5)'s protection, by contrast, is sharply delimited to commuter authorities that could have contracted with Amtrak for operation of local rail service. Defendants have failed to provide any reason to conclude that Congress believed that for SEPTA to enforce its tax immunity in federal court would be more disruptive of state tax systems and applicable principles of comity than for Amtrak to do the same. Similarly, this is not an instance where the validity of state tax assessment turns on questions of state tax law, " 'which, like issues of state regulatory law, are more properly heard in the state courts.' " *California v. Grace Brethren Church,* 457 U.S. 393, 410 (1982). Rather, Congress has created an exemption whose contours turn exclusively on interpretation of congressional purpose.

SEPTA III, 802 F. Supp. at 1284-85 (some citations omitted).

To the district court's extensive list of reasons why section 581(c)(5) should be read as an exemption to the TIA, we add one more. We note that section 581(c)(5) begins with the phrase "[n]otwithstanding any other provision of law." Appellees conceded at oral argument that they could think of no federal law except the TIA to which this might refer. The "notwithstanding" language should be "construed to give maximum effect to all [the statute's] provi-

sions," *Conoco. Inc. v. Skinner,* 970 F.2d 1206, 1224 (3d Cir. 1992) (quotations omitted), and other courts have found this phrase to be an important clue that Congress intended to waive the TIA. *See, e.q., Clark,* 986 F.2d at 604 (finding no waiver of TIA, in part because statute lacked "notwithstanding" language) *Carrollton-Farmers Branch Independent Sch. Dis't v. Johnson & Cravens,* 858 F.2d 1010, 1014-15 (5th Cir. 1988) (finding waiver of TIA, in part because statute contained "notwithstanding" language), *clarified,* 867 F.2d 1517 (5th Cir. 1989), *vacated on other grounds,* 889 F.2d 571 (5th Cir. 1989) *Irvina Independent Sch. Dis't v. Packard Properties. Ltd.,* 741 F. Supp. 120, 122 (N.D. Tex. 1990) (same).

Thus, after reviewing the text, structure and history of section 581(c)(5), we agree with the district court that in order to be exempt to the "same extent" as Amtrak, SEPTA must have equivalent access to the federal courts, and therefore section 581(c)(5) incorporates section 546b's waiver of the Tax Injunction Act.

III.

For the foregoing reasons we will affirm the judgment and order of the district court.

To THE CLERK:

Please file the foregoing opinion.

/s/ Dolores K. Sloviter

Chief Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Southeastern Pennsylvania Transportation Authority	:	Civ. No. 92-0112
v.	:	
Pennsylvania Public Utility Commission and Township of Lower Merion	:	

Southeastern Pennsylvania Transportation Authority	:	Civ. No. 92-1029
v.	:	
Pennsylvania Public Utility Commission and Township of Upper Gwynedd	:	

Southeastern Pennsylvania Transportation Authority	:	Civ. No. 92-3793
v.	:	
Pennsylvania Public Utility Commission	:	

Pollak, District Judge September 29, 1992

OPINION

These consolidated cases involve three separate orders issued by defendant Pennsylvania Public Utility Commission ("the PUC") allocating costs upon plaintiff Southeastern Pennsylvania Transportation Authority ("SEPTA") for maintenance of four highway bridge structures that pass over railway lines owned and operated by SEPTA.[1] SEPTA claims that this assignment of costs is precluded by a pair of federally conferred tax immunities: 45 U.S.C. §581(c)(5) and 45 U.S.C §546b.[2] Defendants — the PUC and two Pennsylvania townships forced to share bridge maintenance costs with SEPTA — argue that this court lacks jurisdiction to hear this action because, under the Tax Injunction Act, 28 U.S.C. §1341 [hereinafter §1341], "[t]he district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State."[3]

§1341 withholds from federal courts power to decide questions that otherwise would fall within the jurisdiction of the federal courts; however, Congress can create a statutory exception to §1341, and has indeed done so in 45 U.S.C. §546b for Amtrak. The main question presented in these cases is whether Congress intended §581(c)(5) to bestow upon SEPTA, a commuter and urban transit enterprise, a tax immunity of the sort conferred on Amtrak by §546b, enforceable in the federal courts notwithstanding §1341.

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[1]None of these consolidated cases involves any of the 133 *railway* bridges that carry SEPTA owned and operated railway lines over public highways, or any of the highway bridges that overhang railway lines operated by SEPTA but owned by other railroad companies.

[2]*See infra* pp. 7-9 for the text of these provisions.

[3]Additionally, defendant Township of Lower Merion argues that SEPTA has failed to state a claim tax immunity, *see infra* Part III, and the PUC argues that the Eleventh Amendment precludes this court from entertaining the action against it. *See infra* Part V.

I

Factual and Procedural Background

The PUC is invested with power to allocate costs of construction and maintenance of rail-highway crossings among interested parties. *See* 66 P.C.A. §2704(a); *see generally Pa. Dept. of Transportation v. Pa. P.U.C.*, 464 A.2d 645 (Pa. Comm. 1983). Factors considered by the PUC in making such assessments include prior ownership and maintenance responsibilities, benefits that will flow to the parties from the crossing, availability of funds, ownership of the tracks, and the general equities of the case. *National Railroad Passenger Corp. v. Pa. P.U.C.*, 665 F.Supp. 402, 403 n. 3 (E.D.Pa. 1987), *aff'd National R.R. Passenger Corp. v. Pa. P.U.C.*, 848 F.2d 436, 440 (3d Cir. 1988) *(Amtrak I), cert. denied* 488 U.S. 893 (1988).

In 1982, the PUC began a series of investigations to determine the safety of all bridges in Pennsylvania that carry public highways over railroad tracks. At that time, bridge maintenance was mostly being funded by cities and local townships and, in some instances, by the trustees of the Penn Central Transportation Company.[4] Many of the inspected bridges were found to be in poor condition, and in 1987, the PUC began to reevaluate the maintenance responsibilities for a number of these bridges. In many cases, SEPTA — when it owned and operated the underlying rail lines — was assigned interim and then final maintenance responsibilities for the bridges.

At issue in these consolidated cases are maintenance costs imposed on SEPTA with respect to four highway bridges: the Montgomery Avenue bridge in defendant Township of Lower Merion, Swedesford Road bridge located in defendant Upper Gwynedd, and Johnson Street bridge and Willow Grove Avenue bridge in the City of

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[4]The Pennsylvania Railroad, which merged with the New York Central Railroad and became the Penn Central Transportation Company in 1968, entered bankruptcy in 1970.

Philadelphia SEPTA owns and operates the railway lines passing beneath each of these bridges,[5] and, with the exception of the Montgomery Avenue bridge, the PUC determined that each of the bridge structures was also owned by SEPTA.[6] The highways, on the other hand, are owned by the defendant townships and the City of Philadelphia. Determining that benefits from a separated crossing accrued both to SEPTA, as the railway line operator, and to the localities, as the road owners, the PUC — in three separate proceedings— imposed shared maintenance responsibility for each of the bridges.[7]

Before final maintenance responsibilities were assigned, Administrative Law Judge Marlene Chestnut, in each instance, conducted evidentiary hearings, made recommended decisions, and presented those decisions to the PUC. The PUC then entertained exceptions from interested parties and issued three final rulings. During the course of these proceedings, the Third Circuit, applying Amtrak's federally-created tax exemption (§546b), enjoined the PUC from imposing upon Amtrak the costs of reconstructing a highway bridge, *see National R.R. Passenger Corp v. Pa. P.U.C.,* 848 F.2d 436 (3d Cir. 1988) (Amtrak I), and

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[5]Ownership of each of the lines in question (the Ivy Ridge Line, Route R5, and the Chestnut Hill West Line) was transferred to SEPTA from Consolidated Rail Corporation (popularly known as "Conrail") between 1976 and 1979.

[6]The Commission found that ownership of the bridges was transferred by Conrail along with the railroad rights-of-way.

[7]For the Swedesford Road, Johnson Street, and Willow Grove Avenue bridges, the locality was held responsible for maintaining the bridge road surface and the top of the bridge itself, and SEPTA was required to maintain the rest of the substructure and superstructure of the bridge. For the Montgomery Avenue bridge, SEPTA was allocated the up-keep cost for the bridge below the exterior surface of the bridge's arch, the adjacent sidewalks, and the facilities at the crossing itself, and Lower Merion Township was ordered to perform an annual inspection of the bridge.

Congress enacted §581(c)(5), extending to commuter authorities like SEPTA exemption from "taxes or other fees to the same extent as" Amtrak. In each of the three separate proceedings, SEPTA argued before the PUC that §581(c)(5) precluded the allocation of bridge maintenance costs to SEPTA. Relying on *Southeastern Pa. Transp. Authority v. Pa. PUC,* 592 A.2d 797 (Pa. Comm. 1991), *appeal denied* by ____ A.2d ____ (July 13, 1991 Table No. 626E.D.1991), and *City of Philadelphia v. Pa. PUC*, 592 A.2d 808 (Pa. Comm. 1991), *appeal denied by* ____ A.2d ____ (July 13, 1991 Table No. 627E.D.1991), the PUC determined that §581(c)(5) was inapposite.[8]

Subsequently, SEPTA filed three separate complaints with this court challenging the legality of the PUC's orders and requesting declaratory and injunctive relief. On August 19, 1992, I consolidated these cases.

II

History of the Tax Exemption Statutes

The Consolidated Rail Corporation ("Conrail") was established by the Regional Rail Reorganization Act of 1973, 45 U.S.C. §701 et seq., to purchase and operate the properties of insolvent railroads and form an efficient national rail transport system. *Consolidated Rail Corp. v. Darrone,* 465 U.S. 624, 627 (1984). Conrail, almost from its inception, operated commuter rail lines at a consistent loss — despite massive federal investment. As a result, the Northeast Commuter Rail Service Act of 1981 45 U.S.C. §581 *et seq.,* required Conrail to cease provision of local commuter rail service at the end of 1982 and transfer such operations to local commuter authorities. Concerned that

[8]In these opinions, the Pennsylvania Commonwealth Court held that §581(c)(5) does not entitle SEPTA—as a mere state organization—to the same broad state tax immunity that Amtrak deserved as a quasi-federal entity. Additionally, the court concluded, disagreeing with the Third Circuit, that assessments for maintenance are not "taxes or other fees" within the meaning of the federal exemption.

local authorities could not handle such services on their own, Congress, in the same Act, created the Amtrak Commuter Services Corporation ("Amtrak Commuter"), as a wholly owned subsidiary of the National Railroad Passenger Corporation ("Amtrak"). Amtrak Commuter was made available to local authorities, on a contract basis, to provide commuter rail service formerly handled by Conrail. Under this reorganization, local commuter authorities had the option to contract out operation of rail commuter services to Amtrak Commuter or operate their own rail commuter services. SEPTA elected the latter course and, on January 1, 1983, assumed from Conrail the operation of thirteen commuter rail lines.

Like Conrail, the National Railroad Passenger Corporation ("Amtrak") — established as a "for profit corporation" by Congress in 1971 to provide intercity rail passenger service, 45 U.S.C. §541 — experienced serious financial woes through the 1970s, despite significant federal support. In 1981, Congress passed legislation designed to cut back Amtrak's federal subsidy. *See, e.g.,* 45 U.S.C. §564(c)(4)(A) (requiring Amtrak to recover at least one-half of its operating costs from revenue). Then, on September 10, 1982, Congress enacted 45 U.S.C. §546b, exempting Amtrak and Amtrak Commuter "from any taxes or other fees imposed by any State, political subdivision of a State, or a local taxation authority which are levied on the Corporation, or any railroad subsidiary thereof, from and after October 1, 1981 . . . " The statute continues:

> Notwithstanding the provision of section 1341 of Title 28, the United States district courts shall have original jurisdiction over any civil actions brought by the Corporation to enforce the exemption conferred hereunder and may grant equitable or declaratory relief as requested by the Corporation.

95 Stat. 852 (1982), codified at 45 U.S.C. §546b.

The genesis of the tax exemption mandated by §546b is clear. The Secretary of Transportation determined that it would be inappropriate for states and localities to tax a pri-

marily federal investment, particularly where that entity was struggling financially.

> Had Amtrak been profitable as well as initially expected, it would have met its tax obligations with private funds, just as other private corporations do. Instead, it now meets its obligations with public funds. The irony of paying taxes with taxes has the effect of diverting Amtrak's attention and funds from the purpose Congress intended.

Department of Transportation (DOT) Report (September 1980), *quoted in,* H. Rep. No. 81, 97th Cong., 1st Sess. 20. (1981). Congress apparently agreed with this reasoning, and in light of the benefits received by the states and localities from Amtrak's service, decided to allocate to them some of the attendant costs.

> [A permanent tax exemption] was given in recognition of the fact that there are many parts of the country which would gladly pay an amount equal to local or State taxes owed by Amtrak in order to have the benefit of Amtrak service. It remains the Committee's judgment that those who receive this service have some obligation to contribute toward its continuation. At a time when local jurisdictions are demanding that nationwide rail passenger service be maintained, it seems reasonable to provide for a "user contribution" whereby those areas receiving the service in turn contribute to Amtrak's continued existence through tax relief.

S. Rep. No. 516, 97th Cong., 2d Sess 170 (1982).

In 1988, Congress enacted 45 U.S.C. §581(c)(5), providing that:

> Notwithstanding any other provision of law, any commuter authority that could have contracted with Amtrak Commuter for the provision of commuter service but which elected to operate directly its own commuter service as of January 1, 1983, shall be exempt from the payment of any taxes or other fees to the same extent as [Amtrak] is exempt.

SEPTA is expressly defined as a "commuter authority." See 45 U.S.C. §502(8). §581(c)(5) apparently has no significant legislative history.

III

"Taxes or Other Fees"

As an initial matter, defendant Township of Lower Merion argues that SEPTA has failed both to state a claim under Fed. R. Civ. P. 12(b)(6) and to establish federal question jurisdiction under 28 U.S.C. §1331, because no "taxes or other fees" have been imposed on SEPTA within the meaning of §581(c)(5).[9] Challenges to jurisdiction based on the legal insufficiency of a claim are subject to the standards of a 12(b)(6) motion, and dismissal is warranted only if defendant shows that no claim has been stated. *Kehr Packages. Inc. v. Fieldcor, Inc.*, 926 F.2d 1406, 1408-09 (3d Cir. 1991), *cert. denied*, _____ U.S. _____, 111 S.Ct. 2839 (1991). The position that no "taxes or other fees, within the meaning of §546b, are involved in this case is flatly contradicted by *National R.R. Passenger Corp v. Pa. P.U.C.*, 848 F.2d 436 (3d Cir. 1988) *(Amtrak I)*, whose underlying facts are virtually indistinguishable from the situation at bar.[10]

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[9]By contrast, the PUC and the Township of Upper Gwynedd appear to allow, for purposes of their motions to dismiss for lack of subject matter jurisdiction, that the assignment of maintenance obligations is a "tax" within the meaning of §581(c)(5).

[10]The Pennsylvania Commonwealth Court recently declined to follow the Third Circuit's holding in *Amtrack I* that the allocation of bridge maintenance costs is a "tax or other fee" within the meaning of §546b. *See supra* note 8. Nonetheless, it is well understood that "[w]here a federal right is concerned, we are not bound by the characterization given to a state tax by state courts or legislatures, or relieved by it from the duty of considering the real nature of the tax and its effect upon the federal right asserted." *United States v. Allegheny County*, 322 U.S. 174, 184 (1943); *see also Robinson Protective Alarm Co. v. City of Philadelphia*, 581 F.2d 371, 375 (3d Cir. 1978) (declining to infer a congressional intent to leave a jurisdictional provision dependent on state law "absent an unambiguous and express incorporation by statute.") A state court arguably has some leeway to disregard decisions on federal questions handed down by the federal court of appeals for the circuit embracing that state, *see SEPTA v. P.U.C.*, 592 A.2d at 803 n.9, but a federal district court has no such luxury.

In that case, the PUC had ordered Amtrak to pay 20% of the costs involved in the replacement of a highway bridge structure that traversed Amtrak-owned railway tracks. The district court, entertaining Amtrak's challenge to the PUC order, granted summary judgment in Amtrak's favor and permanently enjoined the PUC from assessing the costs in question. *See National R.R. Passenger Corp. v. P.A. P.U.C.*, 665 F.Supp. 402, 410 (E.D.Pa 1987). In doing so, the district court found no merit in what it termed a "hyper-technical" distinction between a general tax (imposed in return for the overail benefits of government) and a special assessment (made in consideration of a distinctive benefit received).[11] The district court noted that the fee in question — regardless of why it was imposed and whom it benefited — was incompatible with the clear congressional purpose that funds appropriated to Amtrak not be diverted to the state and local governments. As further support for its broad understanding of §546b, the court emphasized that the statute was designed to guarantee the survival of a federally-created entity. "The federal government has pursued governmental functions and policies through Amtrak. It would be inappropriate to undermine these goals through the too stingy construction of the exemption offered by defendants." 665 F.Supp. at 411. Accordingly, the court concluded that §546b extended to special assessments to finance the replacement of the bridge.

The Third Circuit agreed with the district court that this tax exemption should be liberally construed because of Amtrak's "federal ties." *National R.R. Passenger Corp. V. Pa. P.U.C.*, 848 F.2d 436, 440 (3d Cir. 1988) *(Amtrak I).* Acknowledging that tax exemptions to private entities are typically strictly construed, the court reasoned that

[11]In other contexts, an entity generally exempt from taxes had, nevertheless, been required to pay special assessments that increased the value of the affected property and flowed into the local rather than the state treasury. *See Illinois Central R. Co. v. City of Decatur,* 147 U.S. 190 (1893).

Amtrak deserved virtually the same privileged tax status as the federal government which, in the absence of an express exception by Congress, is typically immune from direct state taxation.

> [T]he unique structure and mission of the Corporation are sufficient to remove it from the realm of purely private entities. Consequently, we need not assume that the customary presumption of obligation to pay state and local taxes applied to the Corporation. To the contrary, the signals point the other way. The House Committee on Energy and Commerce said that Amtrak was to be exempt from payment of "all state and local taxes, *including but not limited to* property taxes, income and franchise taxes, sales taxes, gross revenue taxes, fuel taxes, licenses and other fees, *to the same extent as the United States is exempt* from the payment of such taxes or other fees.

848 F.2d at 440 (citation omitted) (emphases in original). The court continued:

> [Congress's] intention is clear — to impose a passenger rail "user fee" on state and local governments. It would be manifestly inconsistent with that design to make Amtrak pay for related local improvements in the many instances where the states could, and would, impose them.

Id. Therefore, the Third Circuit concluded that Amtrak's immunity from local "taxes or other fees" in section 546b extends to involuntary assessments to improve a bridge.[12]

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[12]The involuntary assessments involved in *Amtrak I* and the instant case are clearly distinguishable from *National R.R. Passenger Corp. v. City of New York*, 882 F.2d 710 (2d Cir. 1989), on which the Pennsylvania Commonwealth Court relied. In that case, the Pennsylvania, New York and Long Island Railroad Company had entered agreements with New York City in 1902 and 1907, wherein it earned the right to operate its railroad on city property in return for an annual rental payment to the City for the use of streets, waterways, and public lands. Amtrak succeeded in interest to the Pennsylvania, New York and Long Island

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Defendant Township of Lower Merion attempts to distinguish *Amtrak I* by arguing that SEPTA, unlike Amtrak, is a state instrumentality subject to regulation by the PUC, therefore, on the Township's view, SEPTA is not entitled to the same broad immunity from state taxes that the Third Circuit preserved for the quasi-federal Amtrak. While it is of course possible to construct reasons why SEPTA should not receive the same tax exemption as Amtrak, Congress, in section 581(c)(5), conferred tax immunity on SEPTA "to the same extent" as Amtrak. When the terms of a statute are unambiguous, "judicial inquiry is complete." *Rubin v. United States,* 449 U.S. 424, 430 (1981). Therefore, just as the imposition of an assessment on Amtrak to finance the reconstruction of a bridge running over its tracks is a "tax or other fee" under §546b, so the allocation of maintenance responsibilities for the four bridges in question is — "to the same extent" — a "tax or other fee" within the meaning of

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Railroad Company, and, after 546b was enacted, ceased paying rental fees to the City. The Second Circuit held that the provision did not relieve Amtrak of its obligation to pay rent for the rights of way it had obtained from the City. The court pointed to specific language in the DOT Report that "'it is not the Committee's desire to exempt Amtrak from the payment of fees for services used, such as water and sewer, just as the United States is not exempt from the payment of such fees.'" 882 F.2d at 714 (quoting DOT Report, in, H. Rep. No. 81, 97th Cong., 1st Sess. 21. (1981)). Additionally, on the court's view, the consensual agreement between Amtrak's predecessors and the City proved that the rental payments were not taxes, which are unilaterally imposed. The court concluded:

> [B]ecause this case involves consensual payments made in exchange for the use of real property by Amtrak, we have no occasion to consider whether the Third Circuit's reasoning in *National Railroad Passenger Corp.,* 848 F.2d 436, would lead to a different result. In that case, the court concluded that a nonconsensual assessment on Amtrak intended to partially fund construction of a bridge was an assessment for a local improvement from which Amtrak was exempt. In contrast, the circumstances presented to us so clearly concern an area not within the parameters of section 546 that it is unnecessary to consider the federal tax immunity rules considered by the Third Circuit.

882 F.2d at 716 n. 2.

§581(c)(5).[13] Accordingly, plaintiff has stated a claim under Rule 12(b)(6) and raised a federal question under 28 U.S.C. §1331.

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[13]Where a jurisdictional determination requires resolution of genuinely disputed facts intertwined with the merits of the case, that decision typically should await a determination of the relevant facts by the court on summary judgment or by the fact-finder at trial. *Boyle v. Governor's VOAC,* 925 F.2d 71, 74 (3d Cir. 1991); *Wade v. Roqala,* 270 F.2d 280, 285 (3d Cir. 1959); see *generally* 4 C. Wright and A. Miller, *Federal Practice and Procedure* §1350 at 235 (1990). However, here, Amtrak I— which is so directly on point— dictates the conclusion that the costs in question are "taxes" under 581(c)(5), as a matter of law.

There are two potential—but ultimately unimportant—factual distinctions between the costs allocated to SEPTA and the costs levied on Amtrak. First, in this case SEPTA was charged with the responsibility of maintaining an existing bridge, whereas Amtrak was ordered to fund the construction of a new bridge. In *National Railroad Passenger Corporation v. Commonwealth of Pennsylvania,* No. Civ. A. 86-8357, 1991 WL 998 (E.D.Pa. Jan. 2, 1991) (*Amtrak II*), the PUC— having decided to repair rather than replace the bridge at issue in *Amtrak I*— argued that as the successor in interest to the Pennsylvania Railroad, which had built the bridge, Amtrak was required to contribute to its maintenance, while allowing that Amtrak could not be ordered to finance its replacement. Judge Newcomer decided that the repair versus replace distinction "was a distinction without a difference." 1991 WL 998 at *2. Forced payments for local improvements constitute a "tax or other fee" within the meaning of 546b and 581(c)(5), regardless of the precise form that these improvements might take.

A second possible factual difference is that, with regard to three of the four bridges involved in the instant consolidated cases, the PUC made a formal finding that SEPTA owned the structure. The PUC concluded that the conveyance of the rights-of-way included, with it, ownership of the overhanging structures. While this pronouncement of ownership may deserve res judicata effect on that particular issue, *see National Railroad Passenger Corp.,* 665 F.Supp. at 407, it is another "distinction without a difference" for purposes of 581(c)(5). In Amtrak I, the district court determined, and the Third Circuit affirmed, that the allocation of bridge replacement costs was a "tax or other fee" without considering the question of ownership of the bridge or future ownership of the reconstructed bridge. The absence of discussion of bridge ownership suggests that this fact was not relevant to a characterization of the fee in question. (Indeed, the PUC itself, even in these consolidated cases, has allocated bridge maintenance costs to SEPTA where SEPTA was not the

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IV

§1341's Jurisdictional Bar

The mere presence of a federal question will not suffice to establish jurisdiction where the jurisdictional bar raised by §1341 operates. Accepting, as likely, defendants' contention that §1341 extends to the instant efforts to enjoin the PUC's allocation of bridge maintenance costs,[14] the challenge is to reconcile §1341, which bars jurisdiction, with §§581(c)(5) and 546b, which would appear to confer it.

Defendants do not dispute, nor could they, that Congress can create a statutory exception to §1341. *See, e.q., Burlington Northern R. Co. v. Oklahoma Tax Com'n,* 481 U.S. 461 (1987) (holding that district court could review railroad's claim under the federal Railroad Revitalization and Regulatory Reform Act of discriminatory state taxation, where that Act expressly declared exception from §1341). Here, §546b explicitly allows Amtrak and its subsidiaries to enforce their tax exemption in federal court "[n]otwithstanding the provision of section 1341 of Title 28," and §581(c)(5) exempts SEPTA from taxation "to the

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owner of the bridge; instead of stressing ownership of the bridge, the PUC, as in *Amtrak II*, has argued that the responsibility to maintain the bridge runs with ownership of the tracks beneath it.) Moreover, SEPTA—which evidently perceived no net benefit in bridge ownership— opposed any determination that it owned the various bridges. It would be inappropriate to hinge the scope of a federal tax immunity on a formal state declaration lacking any relevant effect on the underlying equities. *See supra* note 10.

[14]§1341 precludes the district courts from restraining the collection of any "tax under State law" in certain circumstances, and the meaning of the term "tax under State law" is "determined as a matter of federal law by reference to congressional policies underlying the Tax Injunction Act, rather than by the adoption of state tax labels developed in entirely different legal contexts." *Robinson*, 581 F.2d at 374. Therefore, the determination by the Pennsylvania Commonwealth Court that bridge maintenance cost allocation is not a "tax" under §581(c)(5) is not relevant to a federal court's determination of whether that fee is a "tax under State law" within the meaning of §1341.

same extent" as Amtrak. Even though it is impossible to make sense of §581(c)(5) without reference to §546(b)—because the former is designed to replicate the latter—defendants would separate the two provisions, at least for jurisdictional purposes. On defendants' view, because §581(c)(5) does not remove §1341's jurisdictional bar in the same direct terms as does the Amtrak exception, this court has no jurisdiction to entertain this case on the merits.

It is true that where Congress has withheld federal court jurisdiction over a general class of cases, as in 1341, the district courts should not exercise jurisdiction over a case falling within that provision, absent clear congressional authorization. *See, e.g., Blangers v. Burlington Northern Inc. et al,* 872 F.2d 327, 328 (9th Cir. 1989) (per curiam). Nonetheless, in searching for clear indications of congressional intent, it is possible to construe statutes too narrowly. To demand that Congress write out the magic words "notwithstanding the limitations on district court jurisdiction embodied in 28 U.S.C. §1341" whenever it desires to create a federally-enforceable tax immunity — thereby precluding the shorthand method of incorporation as well as the obvious, but implicit, repeal — would be to expect an unrealistic linguistic precision in the legislative process. *Cf. Pennsylvania v. Union Gas Co.,* 491 U.S. 1, 56 n. 7 (1989) (White, J., concurring) (refusing to require any "magic words" in a statute to achieve abrogation of the Eleventh Amendment).[15] Perhaps for this reason, courts have never required Congress literally to declare, using any particular words, that §1341 does not apply when the statutory scheme otherwise makes clear Congress's desire to confer a federally-enforced tax immunity. Indeed, courts

[15]See discussion infra note 24. If Congress need not use "magic words" to abrogate the Eleventh Amendment—even though that amendment (unlike §1341) implicates the fundamental constitutional balance between the federal government and the states, *Atascadero State Hospital v. Scanlon,* 473 U.S. 234, 242-43 (1985) — it follows that Congress should have at least that degree of latitude when it carves exceptions to its own general policies.

have based exceptions to §1341 on statutes that did not so much as mention the Tax Injunction Act: *See, e.q., Moe v. Confederated Salish & Kootenai Tribes,* 425 U.S. 463 (1976) (upholding a federal district court injunction against Montana's collection of certain sales taxes from Indian merchants based on 28 U.S.C. §1362,[16] which gives the district courts original jurisdiction over certain civil actions brought by Indian tribes but nowhere mentions 1341); *City Vending of Muskogee v. Oklahoma Tax Com'n,* 898 F.2d 122, 123 (l0th Cir 1990) (per curiam), *cert. denied,* _____ U.S. _____ , 111 S.Ct. 75 (1990) (§1341 "will not preclude the determination of state tax liability where federal courts have jurisdiction under the Bankruptcy Code, 11 U.S.C. §505,"[17] even though the Code makes no reference to 1341); *Firestone Tire & Rubber Company v. Bodle,* 645 F. Supp. 305, 310 (N.D.Ohio. 1986) (concluding that Congress created an exception to §1341 in 29 U.S.C. §1132,[18] which permits a civil action in federal court for enforcement of rights under ERISA, but which nowhere mentions §1341). Therefore, the mere absence of explicit reference to §1341 in §581(c)(5) does not itself preclude this court from exercising jurisdiction in this case.

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[16]28 U.S.C. §1362 (1976) provides:

> The district courts shall have original jurisdiction of all civil actions, brought by any Indian tribe or band with a governing body duly recognized by the Secretary of the Interior, wherein the matter in controversy arises under the Constitution, laws, or treaties of the United States.

[17]Under §505(a)

> the court may determine the amount or, legality of any tax, any fine or penalty relating to a tax, or any addition to tax, whether or not previously assessed, whether or not paid, and whether or not contested before and adjudicated by a judicial or administrative tribunal of competent jurisdiction.

[18]This section of ERISA provides in relevant part that "the district courts. . . shall have exclusive jurisdiction of civil actions under this subchapter brought by the Secretary or by a participant, beneficiary, or fiduciary." 29 U.S.C. §1132(e)(1).

Claiming that jurisdictional statutes are narrowly construed, defendants would read §581(c)(5)'s "to the same extent as" language as conferring on SEPTA the "same" substantive tax immunity as Amtrak but not the same federal court access to enforce that immunity.[19] However, the general canon of statutory construction that federal courts "scrupulously confine their own jurisdiction to the precise limits which the statute has defined" *Healy v. Ratta,* 292

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[19]As support for this distinction between immunity and jurisdiction, defendants rely on *Navajo Tribal Utility Auth. v. Ariz Dept. of Revenue,* 608 F.2d 1228 (9th Cir. 1979). In that case, the Navajo Tribal Utility Authority (NTUA)— a subordinate economic enterprise of the Navajo Indian Tribe— appealed from the district court's dismissal of its action seeking to enjoin the Arizona Department of Revenue from imposing various taxes. In attempting to avoid §1341, the NTUA relied on 28 U.S.C. §1362, which, in *Moe, supra,* the Court had interpreted as authorizing an Indian tribe to sue in federal court to enjoin imposition of certain taxes on Indian merchants, notwithstanding §1341. The Ninth Circuit found that §1362 was not directly available to the NTUA, since it was not an "Indian tribe or band" within the meaning of the Act. Alternatively, the NTUA attempted to bring itself under the umbrella of §1362 indirectly. Noting that the Supreme Court had recognized that a tribe has standing to protest taxes on a tribal enterprise in state court, *see Mescalero Apache Tribe v. Jones,* 411 U.S. 145 (1973), the NTUA argued that a tax imposed on a tribal enterprise should, for jurisdictional purposes, be treated as a tax against the tribe itself. To this argument, the court responded, "such a view speaks only to the question of tax immunity, not to the question of federal jurisdiction . . . `United States District Courts are courts of limited jurisdiction and jurisdictional statutes are closely construed.'" 608 F.2d at 1233 (citations omitted). On the discrete jurisdictional question, the court noted that "[t]here is not the slightest suggestion in the plain language of section 1362 itself or its limited legislative history that Congress designed the statute to provide access to federal courts for subordinate, semi-autonomous entities of Indian tribes and bands." 608 F.2d at 1232.

Navajo Tribual Utility does not help defendants. This case stands for the unexceptionable proposition that a judicially-conferred right to enforce a tax immunity in state court does not itself translate into a right to enforce that immunity in federal court, especially where there is no indication that Congress intended to provide such federal access. The opinion does not deny that when Congress evinces a desire to accord plaintiff the same tax treatment as an entity allowed to enforce its immunity in federal court, this intention should be.

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U.S. 263, 270 (1934), in no way relieves this court of the obligation to make a sensible interpretation of the statute consistent with the legislative purpose in enacting it.[20]

It makes no sense to conclude that Congress designed §581(c)(5) to be enforced exclusively in the state courts. That provision does not merely confer federal tax immunity upon commuter authorities; it confers upon any commuter authority that could have contracted with Amtrak for local rail service the same favored tax position as Amtrak so that such an entity is not penalized by its deci-

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Indeed, this case resembles *Moe* much more than *Navajo*. In *Moe*, the Supreme Court upheld a district court injunction against Montana's collection of certain sales taxes from Indian merchants. In doing so, the court relied on 28 U.S.C. §1362, which conferred on the district courts original jurisdiction over all civil actions brought by Indian tribes that raise federal questions. After investigating §1362's legislative history, the Court concluded that Congress had intended to open federal courts to the kinds of claims that could have been, but were not, brought by the United States as trustee. Finding that the United States would not have been barred by §1341 from attacking the state tax in federal court, and that Congress wanted to accord to the tribes similar treatment to that of the United States had it sued on their behalf, the Court concluded that the tribe could also sue in federal court despite §1341. Just as the tribe inherited the United States' right to sue in federal court because of a congressional desire to treat the two entities equivalently for tax purposes, so SEPTA has stepped into Amtrak's shoes, for whom §1341 is no barrier, because-of an identical tax immunity.

[20]Where an exercise of jurisdiction is constitutionally allowable, the objective of this rule is nothing more than to ensure that courts of limited jurisdiction exercise no more power than Congress intended. Scrupulous attention to statutory jurisdictional language is designed to effectuate— not deny—congressional intent. Therefore, most instances in which jurisdictional grants have been narrowly construed have involved the diversity statute, 28 U.S.C. §1332, where strict construction is required because Congress itself followed a policy of narrowing federal court jurisdiction. *See Healy,* 292 U.S. at 270 (noting that the "policy of the [diversity] statute calls for its strict construction") *City of Indianapolis v. Chase Nat. Bank,* 314 U.S. 63, 76 (1941). Conversely, where congressional intent has not pointed toward a narrowing construction, courts have not hesitated to construe jurisdictional grants

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sion to operate commuter rail service directly. It would be manifestly inconsistent with that design to limit SEPTA's legal remedies to state courts, which might, as has proven true here, more narrowly construe the federal tax immunity.

Moreover, reading §581(c)(5) as an exception to the Tax Injunction Act does not frustrate the underlying purposes of that Act. §1341 is designed to preserve from judicial interference "the imperative need of a State to administer its own fiscal affairs," *Tully v. Griffin,* 429 U.S. 63, 73 (1976), but here *Congress itself* has denied fiscal autonomy insofar as the state seeks to impose certain taxes on commuter authorities. The existence of a federally-created tax immunity distinguishes the case at bar from situations where the courts have refused to imply exceptions to §1341 based on the mere existence of a general federal right of action or a general jurisdictional statute that does not specifically pertain to state taxation. *See, e.q., Fair Assessment in Real Estate Ass'n v. McNary,* 454 U.S. 100 (1981) (declining to treat the broad language of §1983 as an exception to §1341); *Ashton v. Cory,* 780 F.2d 816, 821 (9th Cir. 1986) (refusing to read ERISA as an exception to §1341 because "[n]othing in the legislative history of ERISA suggests that in enacting federal law to protect individual pension rights and providing for exclusive federal jurisdiction over certain civil enforcement proceedings under ERISA, Congress sought to override the historic concern for state fiscal autonomy that underlies the Tax Injunction Act"). Where congressional interference with state fiscal autono-

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broadly. *See McCarthy v. Bronson,* U.S._____, 111 S.Ct. 1737 (1991) (although 28 U.S.C. §636(b)(l)(B) confers jurisdiction on magistrate judges only to hear "prisoner petitioners challenging conditions of confinement," magistrate judges may hear §1983 cases in which prisoner seeks relief as to particular incidents of his treatment rather than the overall conditions of his confinement); *Investment Company Institute v. Board of Governors of the Federal Reserve System,* 551 F.2d 1270, 1276-81 (D.C. Cir. 1977) (interpreting the word "order" more broadly in jurisdictional section than in other sections of the Bank Holding Act of 1956).

my is so clear and unequivocal, particular concern about federal *judicial* interference with state revenue collection is less justified.

Additionally, whereas state revenue collection would be seriously interrupted if any taxpayer with a plausible §1983 claim or any pensioner with a tax grievance could sue in federal court, §581(c)(5)'s protection, by contrast, is sharply delimited to commuter authorities that could have contracted with Amtrak for operation of local rail service. Defendants have failed to provide any reason to conclude that Congress believed that for SEPTA to enforce its tax immunity in federal court would be more disruptive of state tax systems and applicable principles of comity than for Amtrak to do the same. Similarly, this is not an instance where the validity of state tax assessment turns on questions of state tax law, " 'which, like issues of state regulatory law, are more properly heard in the state courts.' " *California v. Grace Bretheren Church,* 457 U.S. 393, 410 (1982) (citation omitted). Rather, Congress has created an exemption whose contours turn exclusively on interpretation of congressional purpose.

For all of these reasons, I conclude that §581(c)(5), read—as it must be— in conjunction with §546b, was enacted as an exception to the Tax Injunction Act.

V

Eleventh Amendment

Even though the Commonwealth is not actually named as a defendant in this litigation, the PUC argues that the Eleventh Amendment bars any action against it unless it has consented to that suit. The PUC contends that it deserves Eleventh Amendment immunity because, under state law, it is "an arm of the Commonwealth of Pennsylvania" with powers to regulate railroads that are clearly derived from the legislature of the Commonwealth. PUC's Mem. in Sup. of Mot. to Dis. at 8 (filed in CA No. 92-3793).

It is true that normally a suit may not be brought in federal court against a state or one of its departments or agencies, regardless of the nature of the relief sought. *Pennhurst State School & Hospital v. Halderman,* 465 U.S. 89, 100 (1984). However, even assuming, *arguendo,* that the PUC is otherwise entitled to Eleventh Amendment immunity as an "arm-of-the-state,"[21] Congress may abrogate that

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[21]The PUC appears to rest its claim to immunity on the fact that the state legislature has delegated certain functions to the PUC. However, the mere performance of certain functions delegated by the state does not suffice to turn the action into one against the state. Were the PUC entitled to such blanket immunity, the twenty previous occasions in which the district courts of this circuit have entertained claims against it would appear strange indeed. (This figure comes from a Westlaw search of instances in which the PUC has been named as a defendant in a federal court action within the Third Circuit.)

Generally speaking, a state organization will not be regarded as the alter ego of the state unless payment of a judgment will have to be made out of the state treasury. *See, e.g., Bolden v. Southeastern Pennsylvania Transport. Auth,* 953 F.2d 807, 818 (3d Cir. 1991) (en banc), *cert. denied,* _____ U.S. _____, 112 S.Ct. 2281 (1992) (noting that the most important question in deciding whether a state organization is an alter ego of the state is "whether any judgment would be paid from the state treasury") *Fitchik v. New Jersey Rail Operations. Inc.,* 873 F.2d 655, 659 (3d Cir. 1989), *cert. denied,* 493 U.S. 850 (1989) (same); *Urbano v. Board of Managers of New Jersey State Prison,* 415 F.2d 247, 250-51 (3d Cir. 1969), *cert. denied,* 397 U.S. 948 (1970) (same); *cf. Blake v. Kline,* 612 F.2d 718, 721 (3d Cir. 1979), *cert. denied,* 447 U.S. 921 (1980) (emphasis added) ("The eleventh amendment has been interpreted to bar jurisdictionally the federal courts from entertaining suits for *damages* when a state is the real party in interest."). By focusing on the source of any expected damage award, the "arm-of-the-state" doctrine coincides with the well-settled understanding that the Eleventh Amendment "bars suits in federal court 'by private parties seeking to impose a liability which must be paid from public funds in the state treasury' " *Hafer v. Melo,* _____ U.S. _____, 112 S.Ct. 358 (1991), quoting *Edelman v. Jordan,* 415 U.S. 651, 663 (1974), and does not bar non-money suits against state officers to enjoin violations of federal law. *See Ex Parte Young,* 209 U.S. 123 (1908).

This is not a case where equitable relief has the effect of awarding retrospective money damages against the state treasury, *see Edelman, supra,* since SEPTA in no sense seeks the recovery of funds from the state treasury but rather hopes to preclude the PUC from assessing fees

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immunity by making its intention to do so "unmistakably clear in the language of the statute."[22] *Atascadero State Hospital v. Scanlon,* 473 U.S. 234, 242-43 (1985). Having already found that Congress plainly intended for SEPTA to have a right to enforce its tax immunity in federal court,[23] and since SEPTA is, like Amtrak, "exempt from any taxes or other fees *imposed by any State, political subdivision of a State,* or a local taxation authority . . . ," §546b (emphasis added), it follows that Congress clearly evinced an intent to subject states to suit in federal court when they impose "taxes or other fees" in violation of §§546b and 581(c)(5).[24] Therefore, the Eleventh Amendment does not prevent this court from entertaining jurisdiction over SEPTA's consolidated actions against the PUC.

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against it. Even if the requested injunction would cost the state a great deal of money in the future, it would not be barred by the Eleventh Amendment, *see, e.g., Quern v. Jordan,* 440 U.S. 332 (1979); *Milliken v. Bradley,* 433 U.S. 267 (1977); *Edelman v. Jordan,* 415 U.S. 651 (1974); however, in this case the Commonwealth would appear to suffer no financial loss as the result of an injunction against the allocation of maintenance costs to SEPTA for the bridges in question. The PUC allocates costs of bridge maintenance among interested parties; therefore, if SEPTA were exempt, a greater percentage of those costs would presumably be shifted to other interested parties— like the townships joined in these cases— which are not entitled to Eleventh Amendment immunity. *See, e.g., Mt. Healthy City School Dist. Bd. of Educ. v. Doyle,* 429 U.S. 274, 280 (1977). Therefore, it appears doubtful that the PUC should be treated as an "arm-of-the-state" in these cases.

[22]Contrary to the PUC's assertions that Congress may abrogate Eleventh Amendment immunity only for the limited purpose of enforcing rights under the Fourteenth Amendment, the Commerce Clause grants Congress power to enact a statute that abrogates the Eleventh Amendment, *Pennsylvania v. Union Gas Co.,* 491 U.S. 1, 13-23, 57 (1989), and it is undeniable that state burdens on interstate railroad service fall within the scope of the Commerce Clause.

[23]*See supra* Part IV.

[24]*Pennsylvania v. Union Gas Co.,* 491 U.S. 1 (1989), demonstrates that a statute may abrogate the Eleventh Amendment even when, as here, congressional desire to subject the States to suit in federal court only comes into focus when that statute is read in conjunction with another

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VI

Conclusion

Because SEPTA states a colorable claim that §581(c)(5) precludes the allocation of bridge maintenance costs to SEPTA, and neither §1341 nor the Eleventh Amendment prevents this court from exercising jurisdiction over the instant cases, defendants' motions to dismiss for lack of subject matter jurisdiction and failure to state a claim will be denied.

An appropriate order follows.

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closely related statute. *See* 491 U.S. at 8-9 n.2. *Union Gas* also shows that the absence of explicit reference to the Eleventh Amendment in §§546b and 581(c)(5) does not preclude a finding of congressional abrogation. Even those Justices in *Union Gas* who determined that the statute in question was not sufficiently clear to abrogate the Eleventh Amendment emphasized that they "would not go so far as to hold that Congress must . . . make reference to the Eleventh Amendment . . . before it will be deemed to have abrogated States' immunity . . . " 491 U.S. at 56 n. 7.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Southeastern Pennsylvania Transportation Authority	:	Civ. No. 92-0112
v.	:	
Pennsylvania Public Utility Commission and Township of Lower Merion	:	

Southeastern Pennsylvania Transportation Authority	:	Civ. No. 92-1029
v.	:	
Pennsylvania Public Utility Commission and Township of Upper Gwynedd	:	

Southeastern Pennsylvania Transportation Authority	:	Civ. No. 92-3793
v.	:	
Pennsylvania Public Utility Commission	:	

ORDER

For the reasons given in the accompanying memorandum, it is hereby ORDERED and DIRECTED that:

1. Defendant Pennsylvania Public Utility Commission's motions to dismiss for lack of subject matter jurisdiction are DENIED;

2. Defendant Township of Upper Gwynedd's motion to dismiss for lack of subject matter jurisdiction is DENIED;

3. Defendant Township of Lower Merion's motion to dismiss for lack of subject matter jurisdiction or, alternatively, for failure to state a claim is DENIED.

September 29, 1992

/s/ Louis H. Pollak
Pollak, J.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Southeastern Pennsylvania Transportation Authority	:	Civ. No. 92-0112
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v.	:	
Pennsylvania Public Utility Commission and Township of Upper Gwynedd	:	

Southeastern Pennsylvania Transportation Authority	:	Civ. No. 92-3793
v.	:	
Pennsylvania Public Utility Commission	:	

OPINION

Pollak, District Judge June 29,1993

Before me in these consolidated cases are cross-motions for summary judgment filed, on the one hand, by plaintiff Southeastern Pennsylvania Transportation Authority ("SEPTA"), and, on the other hand, by defendant Pennsylvania Public Utility Commission ("the PUC"), defendant Township of Lower Merion ("Lower Merion"), and defendant Township of Upper Gwynedd ("Upper Gwynedd"). For the reasons that follow, summary judgment will be granted in favor of SEPTA and the PUC will be permanently enjoined from assessing against SEPTA any costs for construction, design, maintenance, inspection or repair of the four subject highway bridges.

I.

Factual and Procedural Background

The background of these consolidated cases has been set out in some detail in a previous opinion denying defendants' motions to dismiss for lack of subject-matter jurisdiction and for failure to state a claim. *See Southeastern Pa. Transp. Auth. v. Pennsylvania Pub. Util. Comm'n,* 802 F. Supp. 1273 (E.D. Pa. 1992). Therefore, I only briefly rehearse those facts here and encourage the interested reader to consult my prior opinion.

In 1991 and 1992, the PUC issued three separate orders requiring that SEPTA make payments toward the upkeep of four highway-bridge structures passing over railway lines owned and operated by SEPTA.[1] In each case, the PUC determined that SEPTA, as the operator of the railway line running under the bridge, benefitted from a separated railway-highway crossing and should therefore share

[1]The four bridges are: the Montgomery Avenue bridge in defendant Lower Merion, Swedesford Road bridge located in defendant Upper Gwynedd, and the Johnson Street and Willow Grove Avenue bridges in the city of Philadelphia (not a defendant in the case at bar).

bridge-maintenance costs with the localities that owned the roads and also benefitted from a separated-crossing.[2] SEPTA argued unsuccessfully to the PUC that this assignment of costs to SEPTA violated a pair of federally-conferred tax exemptions: 45 U.S.C. §581(c)(5) (1988) and 45 U.S.C. §546b (1988).

The history of these tax-exemption statutes is fairly straightforward. In 1981, Congress required that the financially-troubled Consolidated Rail Corporation ("Conrail") — established by federal law to provide national rail transportation — transfer its commuter rail operations to local commuter authorities. To assist these local authorities with handling the provision of commuter service, Congress created the Amtrak Commuter Services Corporation ("Amtrak Commuter"), as a wholly-owned subsidiary of the National Railroad Passenger Corporation ("Amtrak"), and afforded the local authorities a choice between contracting with Amtrak Commuter for provision of commuter rail service formerly handled by Conrail or operating commuter rail service directly. SEPTA decided to operate its own local commuter rail service and, on January 1, 1983, assumed from Conrail the operation of thirteen commuter rail lines.

On September 10, 1982, Congress enacted 45 U.S.C. §546b, exempting Amtrak — which, like Conrail, was struggling financially — and its newly-created subsidiary Amtrak Commuter "from any taxes or other fees imposed by any state, political subdivision of a State, or a local taxation authority which are levied . . . from and after October 1, 1981 . . . ." 95 Stat. 852 (1982), codified at 45 U.S.C. §546b. In exempting Amtrak from state taxation, Congress reasoned that local jurisdictions benefitting from Amtrak's rail service have an obligation to contribute to its continued existence through tax relief. Then, in 1988, Congress enacted 45 U.S.C. §581(c)(5), providing that:

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[2]With respect to three of the four bridges, the PUC found that SEPTA owned the bridge and cited this as an additional reason for requiring SEPTA to contribute to bridge maintenance.

> Notwithstanding any other provision of law, any commuter authority that could have contracted with Amtrak Commuter for the provision of commuter service but which elected to operate directly its own commuter service as of January 1, 1983, shall be exempt from the payment of any taxes or other fees to the same extent as [Amtrak] is exempt.

45 U.S.C. §581(c)(5) (1988).

Relying on two Pennsylvania Commonwealth Court opinions,[3] the PUC determined, in three separate orders, that §581(c)(5) did not exempt SEPTA from assessments for bridge maintenance because such assessments were not "taxes or other fees" within the meaning of the federal exemption. Subsequently, SEPTA appealed each PUC decision to the Pennsylvania Commonwealth Court, and then apparently applied for, and was granted, a stay of each state proceeding after filing each of three separate complaints with this court. In these federal complaints, consolidated on August 19, 1992, SEPTA argues that the imposition upon SEPTA of bridge-maintenance costs violates the federal tax-exemption statutes; SEPTA seeks a declaration to that effect and a permanent injunction against assessment of such costs by the PUC with respect to the four bridges. In its complaints, and again in its motion for summary judgment, SEPTA relies heavily on *National R.R. Passenger Corp. v. Pennsylvania Pub. Util. Comm'n,* 848 F.2d 436 (3d Cir. 1988) *(Amtrak I), cert. denied,* 488 U. S. 893 (1988), in which the Third Circuit held that the immunity afforded Amtrak in §546(b) precluded the PUC from assessing Amtrak for costs incurred in the reconstruction and future maintenance of a bridge overhanging Amtrak-owned railway tracks. On SEPTA's view, because the PUC cannot assign bridge-maintenance costs to Amtrak without

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[3]*See Southeastern Pa. Transp. Auth. v. Pennsylvania Pub. Util. Comm'n,* 592 A.2d 797 (Pa. Commw. 1991), *appeal denied* by 611 A.2d 714 (Pa. 1992), and *Southeastern Pa. Transp. Auth. v. Pennsylvania Pub. Util. Comm'n,* 592 A.2d 808 (Pa. Commw. 1991), *appeal denied by* 611 A.2d 714 (Pa. 1992).

running afoul of §546b, and because, pursuant to §581(c)(5), SEPTA, as a local commuter authority, is entitled to relief from "taxes or other fees to the same extent as" Amtrak, it follows that SEPTA cannot be required by the PUC to contribute to improvements on a highway bridge passing over its railway lines.

In a September 29, 1992 opinion, I rejected defendants' arguments that the Tax Injunction Act, 28 U.S.C. §1341 (1988), or the Eleventh Amendment deprived this court of subject-matter jurisdiction over these consolidated cases, or that SEPTA had failed to state a legally sufficient claim. In doing so, and specifically in response to an argument that no "taxes or other fees" had been imposed upon SEPTA within the meaning of §581(c)(5), I decided that, under *Amtrak I,* the costs in question in these consolidated cases are, as a matter of law, "taxes" under §581(c)(5). Buoyed by this portion of my September 29 opinion, SEPTA, on January 8, 1993, moved for summary judgment, arguing that these cases had, in effect, already been resolved because they could not be distinguished from *Amtrak I.* At about the same time, the three defendants — the PUC, Lower Merion, and Upper Gwynedd — also moved for summary judgment, presenting a number of reasons why judgment should be entered against SEPTA.[4] Thereafter, all parties responded to the opposing motions for summary judgment. Defendants' arguments for summary judgment in their favor and/or to resist summary judgment in favor of SEPTA fall into three categories: (1) deference to state policies and proceedings (2) the unconstitutionality of §581(c)(5) and (3) the inapplicability of §581(c)(5) to the cases at bar (or, at least, factual uncertainty surrounding that statute's applicability). I will address each of these arguments in turn.

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[4]Some of the defendants re-presented their arguments that either the Tax Injunction Act or the Eleventh Amendment robs this Court of jurisdiction over these cases. Nothing presented by any of the defendants provokes me to reconsider my previous opinion denying defendants' motions to dismiss for lack of subject-matter jurisdiction (in which substantially the same arguments were raised).

The standards for granting or denying summary judgment do not change by virtue of cross-motions being presented. *United States v. Hall,* 730 F. Supp. 646, 648 (M.D. Pa. 1990). Therefore, the question now — as always at the summary judgment stage — is whether, provided there is no genuine issue as to any material fact, the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c).

II.

Deference to State Policy and Proceedings

The PUC and Lower Merion recommend that this court decline to exercise its jurisdiction pursuant to either *Burford v. Sun Oil Co.,* 319 U.S. 315 (1943), or *Colorado River Water Conservation Dist. v. United States,* 424 U.S. 800 (1976). In considering the possibility of abstention, it is important to keep in mind that

> [a]bstention from the exercise of federal jurisdiction is the exception, not the rule. "The doctrine of abstention, under which a District Court may decline to exercise or postpone the exercise of its jurisdiction, is an extraordinary and narrow exception to the duty of a District Court to adjudicate a controversy properly before it."

Colorado River, 424 U.S. at 813 (quoting *County of Allegheny v. Frank Mashuda Co.,* 360 U.S. 185, I88 (1959)). These cases do not present one of those limited circumstances where a district court should decline to exercise its jurisdiction in deference to state policies (pursuant to *Burford*) or to pending state proceedings (pursuant to *Colorado River*).

A. *Burford* Abstention

Under the *Burford* doctrine, "[i]f the exercise of federal review would be disruptive of state efforts to establish a coherent policy, and the policy concerns complicated local matters, abstention may be justified." *United Servs. Auto. Ass'n v. Muir,* 792 F.2d 356, 364 (3d Cir. 1986), *cert. denied*

sub nom. Grode v. United Servs. Auto. Ass'n, 479 U.S. 1031 (1987). In *Burford* itself, the Court held that a federal district court should decline to review the Texas Railroad Commission's grant of a permit to drill oil weils where the question was whether the Commission had properly applied complex state regulations and where the state had set up a thorough system of judicial review of such administrative determinations. Under those circumstances, the Court concluded, "a sound respect for the independence of state action requires the federal equity court to stay its hand." 319 U.S. at 334. Defendants argue that because the PUC has power to allocate maintenance responsibilities for rail-highway crossings and a unique ability to assess the benefits flowing to each interested party from a particular crossing, and because enjoining the PUC orders would disrupt its sensible allocation of maintenance responsibilities, this court should, under *Burford,* stay clear of reviewing the PUC orders.

"While *Burford* is concerned with protecting complex state administrative processes from undue federal interference, it does not require abstention whenever there exists such a process or even in all cases where there is a 'potential for conflict' with state regulatory law or policy." *New Orleans Public Serv. Inc. v. Council of City of New Orleans,* 491 U.S. 350, 359 (1989) *(NOPSI)* (quoting *Colorado River,* 424 U.S. at 815-16). For one, the *Burford* doctrine does not pertain if it is clear that federal law has preempted state regulatory authority in a particular area. 17A Charles A. Wright & Arthur R. Miller, *Federal Practice & Procedure* §4244, at 93-94 (1988). Further, when a defendant urges abstention for fear of disruptive effect on state regulatory policy, the defendant must show that the federal court is presented with claims implicating local concerns that fall within the technical or specialized expertise of the state administrative body. *See, e.g., United Servs.,* 792 F.2d at 365 (finding that district court erred in applying *Burford* to state regulation of insurance where the party urging abstention "has not suggested any peculiar local conditions or special expertise required to interpret the [state] statute"); *Baltimore Bank for Coops. v. Farmers*

Cheese Coop., 583 F.2d 104, 110 (3d Cir. 1978) (district court erred in abstaining on basis of *Burford* where "[n]o special expertise or competence" of the agency involved); *accord Property & Casualty Ins., Ltd. v. Central Nat'l Ins. Co. of Omaha,* 936 F.2d 319, 323 (7th Cir. 1991) (footnote omitted) (where abstention is urged for fear of disruption of coherent state policy, the state forum "must stand in a special relationship of technical oversight or concentrated review to the evaluation of those claims"). SEPTA, far from asking this court to assess the reasonableness of the PUC orders against the backdrop of unclear state law or complicated state policies within the special competence of the PUC, simply asks for a construction of federal law — §§581(c)(5) and 546b — and a ruling that the several PUC orders are foreclosed by this federal legislation. Where, as here, no issues of peculiar local concern are required to interpret the allegedly pre-empting federal law, there is no reason for abstention on *Burford* grounds because there is no significant intrusion into state governmental processes. *Cf. NOPSI,* 491 U.S. at 363 (*Burford* abstention not appropriate where "no inquiry beyond the four corners of the Council's retail rate order is needed to determine whether it is facially pre-empted by FERC's allocative decree and relevant provisions of the Federal Power Act.") Although federal review may result in an injunction against enforcement of PUC orders, "there is, of course, no doctrine requiring abstention merely because resolution of a federal question may result in the overturning of a state policy." *Zablocki v. Redhail,* 434 U.S. 374, 380 n. 5(1978).

In short, any disruptive effect on state policy in these cases would flow from a federal legislative design rather than from federal judicial oversight of issues of distinctive local concern. For this reason, it would be manifestly inappropriate to abstain in order to avoid what defendants perceive as "needless" conflict with state policy; where Congress has afforded an exemption from state taxation, any conflict with a State's affairs that this engenders cannot be viewed by this court as "needless." Therefore, I will not abstain on *Burford* grounds.

B. *Colorado River* Deference

Nor is this a case where it would be appropriate to decline to exercise jurisdiction under *Colorado River.* In *Colorado River,* the Court recognized that there are "exceptional" circumstances where it may be appropriate for a federal court to withhold jurisdiction because of a pending state proceeding in order to preserve judicial resources and avoid piecemeal litigation. 424 U.S. at 818. Because *Colorado River* deference is not based on "weightier considerations of constitutional adjudication and state-federal relations, the circumstances permitting the dismissal of a federal suit due to the presence of a concurrent state proceeding for reasons of wise judicial administration are considerably more limited than the circumstances appropriate for abstention." *Id.* "Only the clearest of justifications will warrant dismissal" on this basis, *id.* at 819, and the balance is "heavily weighted in favor of the exercise of jurisdiction," *Moses H. Cone Memorial Hosp. v. Mercury Constr. Co.,* 460 U.S. 1, 16 (1983).[5]

Concern for judicial resources, far from supporting deference to the state proceedings, actually advises against such deference. Although the record before me is not at all clear as to the relevant procedural history in state court; it

[5]The Court, in *Colorado River* and *Moses B. Cone Memorial Hosp.,* identified a number of factors for a federal district court to consider in deciding whether to stay its proceedings in deference to pending state proceedings. These include: (1) whether either court has assumed jurisdiction over a *res*; (2) the relative convenience of the forums; (3) the desirability of avoiding piecemeal litigation; (4) the order in which the forums obtained jurisdiction, *see Colorado River;* 424 U.S. at 818; (5) whether state or federal law is controlling; and (6) whether the state proceeding is adequate to protect the parties rights, *see Moses Cone,* 460 U.S. at 25-26. "These factors are to be applied in a pragmatic and flexible way, as part of a balancing process rather than as a 'mechanical checklist.' " *American Int'l Underwriters, (Philippines), Inc. v. Continental Ins. Co.,* 843 F.2d 1253, 1257 (9th Cir. 1988) (quoting *Moses H. Cone Memorial Hosp.,* 460 U.S. at 16). Following this authoritative guidance, in the text I only balance those factors that seem to me important in these cases at bar — all of which factors seem to point toward the exercise of jurisdiction.

appears that, shortly after each of the three PUC orders was entered (on December 10, 1991, January 21, 1992, and June 2, 1992), and contemporaneously with the filing of each of these three federal actions (on January 8, 1992, February 19, 1992, and June 30, 1992), SEPTA filed a petition for review in the Pennsylvania Commonwealth Court in order to protect its right to appeal in the event of losing in federal court. Shortly after each state appeal was filed, SEPTA, as defendants acknowledge, was granted a stay pending resolution of the related federal proceeding. The PUC and Lower Merion suggest that a reason to defer to the state proceedings is that SEPTA first filed appeals to the Pennsylvania Commonwealth court and only thereafter commenced these federal actions. Even assuming that the petitions for review to the Commonwealth Court preceded the filing of each of the federal complaints — an assumption that appears open to substantial question[6] — since the ultimate concern is the conservation of judicial resources, "priority should not be measured exclusively by which complaint was filed first, but rather in terms of how much progress has been made in the two actions." *Moses H. Cone Memorial Hosp.*, 460 U.S. at 21. There is no indication that any proceedings of consequence took place in state court before the appeals were stayed. (In fact, the staying of the related state-court proceedings is itself reason for this court not to abstain. *See Arizona v. San Carlos*

[6]There is reason to doubt the defendants' chronology. SEPTA's petition for review to the Pennsylvania Commonwealth Court from the December 10, 1991 PUC order (attached as an-exhibit to the PUC's earlier-filed Motion to Dismiss for Lack of Subject-Matter Jurisdiction in Civ. A. No. 92-0112) is dated January 9, 1992—one day after the federal complaint seeking to enjoin enforcement of the December 10, 1991 PUC order (in Civ. A. No. 92-0112) was filed. Similarly, SEPTA's state-court petition for review from the January 21, 1992 PUC order (attached as an exhibit to the PUC's earlier-filed Motion to Dismiss for Lack of Subject-Matter Jurisdiction in Civ. A. No. 92-1029) is dated February 20, 1992—again one day after the related federal complaint was filed. I cannot find anything in the record as to when the state petition for review paralleling the third federal complaint (Civ. A. No. 92-3793, filed June 30 1992) was brought.

Apache Tribe, 463 U.S. 545, 569 (1983) ("[F]ederal courts need not defer to the state proceedings if the state courts expressly agree to stay their own consideration of the issues raised in the federal action pending disposition Or that action.")). Moreover, this court has already issued an opinion deciding that it has subject-matter jurisdiction over the cases and that SEPTA has stated a cognizable claim. Only thereafter (in January 1993— from seven months to one year after each complaint was filed) did the PUC and Lower Merion file motions urging abstention. Where the defendants first request the surrender of jurisdiction long after they were served with the federal complaint; after having filed unsuccessful motions to dismiss, and after the deadline for discovery has passed — i.e., after substantial progress has been made in the federal proceeding — *Colorado River* deference appears inappropriate from the perspective of judicial economy. *See Moses H. Cone Memorial Hosp.* 460 U.S. at 16 (reading *Colorado River* as directing inquiry towards whether "substantial progress" has been made in the federal-court litigation); *Mobil Oil Corp. v. City of Long Beach*, 772 F.2d 534, 542 (9th Cir. 1985) (dismissal of federal action inappropriate where issues before the district court had been fully briefed and the state action had been stayed).

Defendants also argue that this court should abstain to avoid piecemeal litigation. As the PUC puts it, "Piecemeal litigation results when different courts consider the same issue, duplicating efforts and reaching different results." PUC's Mem. in Sup. at 29; *see American Int'l*, 843 F.2d at 1258. It is difficult to see how such duplication will result if this court continues to exercise jurisdiction over these cases. Because the state-court proceedings have been stayed until these proceedings are finished, there will be no duplication of efforts in the interim. Moreover, if, at the conclusion of this proceeding, this court were to enjoin the PUC from enforcing its orders, there would, of course, be no need for SEPTA to return to state court and no occasion for defendants to do so. If, by contrast, this court were to decide that §581(c)(5) does not constitute a basis for enjoin-

ing PUC enforcement of its orders, SEPTA might, at that time, then return to the state court to assert that the assignment of costs to SEPTA constituted an abuse of discretion under state law (or some other state-law violation). However, even in that event there would be no re-adjudication of identical issues because this court has not been asked to address the reasonableness of the PUC determination under state law.[7]

Finally, it is significant also that the issue here is the scope of a federal right. *See Moses H. Cone Memorial Hosp.*, 460 U.S. at 26 ("[T]he presence of federal-law issues must always be a major consideration weighing against surrender [of jurisdiction]."). Defendants posit that SEPTA has effectively forfeited its right to a federal adjudication of the scope of its federal tax immunity by filing protective petitions for review in state court. Preservation of the right to appeal an adverse state administrative determination should not have as its price the surrender of access to a competent federal forum for adjudication of federal claims. To treat the mere presence of a related state proceeding (even where that proceeding has been stayed) as reason enough for a federal court to withhold jurisdiction would be precisely to impose that intolerable cost on the filing of a protective state appeal and might force litigants against their will into state forums.[8]

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[7]Were SEPTA to lose in this court (and on appeal, if any), SEPTA presumably could not re-present the §581(c)(5) argument in state court because, under Pennsylvania law,

> [w]hen a court of competent jurisdiction has determined a litigated cause on its merits, the judgment entered and not reversed on appeal is, as between the parties to the suit and their privies, final and conclusive with regard to every fact which might properly be considered in reaching a judicial determination and with regard to all points of law adjudged as those facts and points of law relate directly to the cause of action in litigation.

Stevenson v. Silverman, 208 A.2d 786, 788 (Pa.) (emphasis and citation omitted), *cert. denied*, 382 U.S. 833 C1965).

[8]The PUC argues that this court should withhold jurisdiction because the Pennsylvania Commonwealth Court has previously ruled that

(footnote continued on next page)

For all of these reasons, I decline to withhold jurisdiction on the basis of *Colorado River,* as I have also declined to dismiss these complaints on *Burford* grounds.

III.

The Constitutionality of §581(c)(5)

The PUC presents two reasons why §581(c)(5) should be declared unconstitutional. First, it argues that §581(c)(5) was not within Congress' authority under the Commerce Clause because Congress lacked a rational basis for finding that an exemption of local commuter authorities from state and local taxes furthers interstate commerce. Alternatively, the PUC argues that, assuming Congress acted within its powers under the Commerce Clause in enacting §581(c)(5), the statute nevertheless invades the core of state sovereignty reserved by the Tenth Amendment (at least as applied to SEPTA) by interfering with the Commonwealth's right to control SEPTA.[9]

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bridge-maintenance costs can be allocated to SEPTA without violating §581(c)(5). *See supra* note 3. Therefore, according to the PUC, SEPTA is now simply engaging in forum shopping. While forum shopping may be a ground to consider under *Colorado Review*, "there is no doctrine of abstention or deference that authorizes a federal court to decline to exercise jurisdiction on the ground of forum shopping alone." Wright and Miller, supra, §4247, at 9 (Supp. 1992) (footnote omitted). Moreover, the Pennsylvania Commonwealth Court; in those rulings, expressly declined to follow the Third Circuit's interpretation of the phrase "taxes or other fees." *See* 592 A.2d at 803 n. 12 ("We disagree with the Third Circuit that a 'special assessment' is a tax"). Therefore, since this court is bound by the Third Circuit's determinations of federal law and must regard them as "correct" — and, *a fortiorari,* more correct than contrary rulings by state courts — it would be inappropriate for me to penalize SEPTA for having sought a federal forum that has proven more hospitable to federal claims analogous to those it now asserts.

[9]The PUC also argues that Congress exceeded its powers under—the Commerce clause in enacting §581(c)(5) because the local commuter authorities immunized from state and local taxes are neither federal entities nor contractors with the federal government. This argument

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A. The Commerce Clause

Because "the Commerce Clause is a grant of plenary authority to Congress," *Hodel v. Virginia Surface Mining and Reclamation Ass'n*, 452 U.S. 264, 276 (1981), "[t]he task of a court that is asked to determine whether a particular exercise of congressional power is valid under the Commerce Clause is relatively narrow," *Id.* The court must determine only whether Congress acted rationally in adopting a particular regulatory scheme— i.e., that there is a "rational basis" for a congressional finding that the regulated activity affects interstate commerce, *id.*, and; second, that the means chosen by Congress were " 'reasonably adapted to the end permitted by the Constitution.' " *Id.* (citation omitted).

Notwithstanding the PUC's objection that Congress made no explicit findings that the regulated activity affects interstate commerce — which is not required, *Katzenbach v. McClung*, 379 U.S. 294, 299 (1964) — Congress' belief that state taxation interferes with interstate commerce can be gleaned from the legislative history of §546b and the clear import of §581(c)(5) itself. As has already been discussed, *see supra* p. 4 and 802 F. Supp. at 1278, Congress exempted Amtrak and its subsidiary Amtrak Commuter from state taxation in part because of concern that such taxation threatened Amtrak's continued existence and, with it, the provision of nationwide rail passenger service.

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can be quickly dismissed. Based on a line of precedent beginning with the venerable *McCulloch v. Maryland*, 17 U.S. (4 Wheat) 316 (1819), the federal government and its instrumentalities are absolutely immune from direct state taxation under the Supremacy Clause. SEPTA's concededly local status, while it would appear to attenuate any argument that SEPTA might be exempt from state taxes by virtue of the Supremacy Clause alone, does not remove from Congress, in the exercise of its delegated commerce powers, the power expressly to confer upon SEPTA an immunity beyond that set by the Constitution itself. *See Prudential Ins. Co. v. Benjamin*, 328 U.S. 408, 422 (1946) ("[I]n all the variations of commerce clause theory it has never been the law that what the states may do in the regulation of commerce, Congress being silent, is the full measure of its power.").

Congress evidently believed that when local commuter authorities took over from Conrail the operation of commuter rail lines that were operated at a consistent loss, state taxation would diminish the ability of these entities to provide effective commuter rail service. It can scarcely be doubted that Congress had reason to believe that the imposition of state and local "taxes or other fees" on an entity engaged in interstate transport,[10] by diverting funds away from operations, has a restrictive effect on that entity's ability to perform its interstate commercial functions effectively — particularly where that same commuter service had previously been operated without profit despite massive federal investment. *Cf. National R.R. Passenger Corp. v. New Castle County,* 633 F. Supp. 354, 361 (D. Del. 1986) (§546b is within congress' Commerce Clause power "[b]ecause Congress had a rational basis for concluding that State and local taxes interfere with Amtrak's ability to provide improved intercity rail passenger service . . .").

The PUC argues that §581(c)(5) was not reasonably calculated to achieve the goal of sustaining and improving commuter rail service because "SEPTA's financial security can hardly be secured by 45 U.S.C. §581(c)(5)." PUC's Mem. in sup. at 24. However, the question is not whether tax exemption guarantees the survival of the exempted commuter rail authorities but whether, when state and local taxes are reasonably found to place a drag on interstate commerce, the elimination of those taxes is a reasonable method of facilitating interstate commerce. *Cf. Arizona Pub. Serv. Co. v. Snead,* 441 U.S. 141, 150 (1982) (Congress could invalidate state tax because it "had a

[10]SEPTA notes that its commuter service operates directly between Philadelphia, Pennsylvania and Trenton, New Jersey and, therefore, that it is engaged in interstate commerce. The PUC does not dispute that SEPTA is engaged in interstate rail service. In any event, Congress' authority under the Commerce Clause extends even to a local transit system engaged in intrastate commerce activity, provided that those intrastate activities affect interstate commerce. *Garcia v. San Antonio Metro. Transit Auth.,* 469 U.S. 528, 537 (1985); *Hodel,* 452 U.S. at 281; *United States v. Wrightwood Dairy Co.,* 315 U.S. 110, 119 (1942).

rational basis for finding that the New Mexico tax interfered with interstate commerce, and selected a reasonable method to eliminate that interference."). While Congress might have proceeded in other ways, and the PUC might question the wisdom of Congress' decision to eliminate state and local taxes on local commuter authorities, Congress' power to protect "interstate commerce against state regulation or taxation . . . is so complete that its ideas of policy should prevail." *State Bd. Of Ins. v. Todd Shipyards Corp.*, 370 U.S. 451, 456 (1962) (footnote omitted) *see also Stafford v. Wallace*, 258 U.S. 495, 521 (1922) (the Court indicating that it would "certainly not substitute its judgment for that of Congress [in selecting a means of eliminating an activity having a detrimental effect on interstate commerce] unless the relation of the subject to interstate commerce and its effect upon it are clearly nonexistent.")

In sum, I find that Congress (1) had a rational basis for believing that state and local assessments interfered with the provision of historically unprofitable commuter rail service within and across state lines, and (2), by eliminating such assessments, selected a rational means of improving such service. It is not the province of this court to substitute its judgment for that of Congress.

B. The Tenth Amendment and Intrusions on State Sovereignty

The Tenth Amendment to the United States Constitution provides: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively or to the people." U.S. Const. amend. X. The PUC's position that Congressional exemption of a railroad from state taxation impermissibly intrudes on the States' traditional powers has been rejected by other courts in situations closely analogous to the case at bar. In *New Castle County, supra,* the court concluded that §546 did not violate the Tenth Amendment because Congress acted within its express powers under the Commerce Clause in exempting Amtrak

from state taxation and because the Court, in *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985), had decided that the Tenth Amendment does not impose any independent limitation on Congress' power to legislate under the Commerce Clause. Similarly, in *New Jersey v. Consolidated Rail Corp.*, 690 F. Supp. 1061 (Sp. Ct. R.R.R.A. 1988), the court decided that Congress has the power to exempt Conrail from state taxation because

> the power of Congress over interstate commerce is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations other than are prescribed in the Constitution, and Garcia has removed the Tenth Amendment as a substantive limitation within the Constitution to Congress' power to legislate upon the states as States . . .

690 F. Supp. at 1066. In the case at bar, however, the PUC's Tenth Amendment argument may be stronger than that advanced in either of the aforementioned cases because (1) the Court recently has at least partially reclaimed what was lost in the wake of *Garcia* and declared that concerns for state sovereignty, as reflected in the Tenth Amendment, may impose limitations on Congress' Article I powers to order a State's regulatory structure, *see New York v. United States*, _____ U.S. _____, 112 S.Ct. 2408 (1992); and (2) SEPTA, unlike Amtrak and Conrail (both corporations established by Congress), is a state-created enterprise the regulation of which, arguably, is a more fundamental attribute of state sovereignty.[11] Still, I conclude that

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[11] SEPTA was created pursuant to the Metropolitan Transportation Authorities Act of 1963. Act of August 14, 1963, P.L. 984, No. 450 (codified as amended at 66 Pa. Stat. Ann. §§2001-2043 (Purdon Supp. 1975 (repealed 1980)), *reenacted and recodified* as the Pennsylvania Urban Mass Transportation Law, 55 Pa. Stat. Ann. §§600.301-.407 (Purdon Supp. 1987 (repealed 1991)), *reenacted and recodified at* 74 Pa. Stat. Ann. §§1501-1543 (Purdon Supp. 1992). SEPTA is currently governed by the Public Transportation Law, 74 Pa. Stat. Ann. §§1501-1543 (Purdon Supp. 1992). Section 1502 of that law — a recodification of the law pursuant to which SEPTA was originally created — provides for the

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because Congress is in no sense commandeering state regulatory processes through §581(c)(5) and because Congress' power to protect interstate rail transport against state taxation and regulation is so complete, the Tenth Amendment does not work to invalidate §581(c)(5) (either generally or as specifically applied to SEPTA).

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creation of transportation authorities such as SEPTA on the following terms:

> There is hereby authorized the creation of a separate body corporate and politic in each metropolitan area, to be known as the transportation authority of such area, extending to and including all of the territory in the metropolitan area. An authority shall in no way be deemed to be an instrumentality of any city or county or other municipality or engaged in the performance of a municipal function, but shall exercise the public powers of the Commonwealth as an agency and instrumentality thereof.

74 Pa. Stat. Ann. §1502 (a). Given this statement of purpose in SEPTA's charter, the Pennsylvania Supreme Court has had "no hesitation in concluding that SEPTA was intended to be considered an agency of the Commonwealth." *Feingold v. Southeastern Transp. Auth.*, 517 A.2d 1270, 1276 (Pa. 1986) (punitive damages could not be assessed against SEPTA given its status as a Commonwealth agency) *see* also *Southeastern Pa. Transp. Auth. v. Pennsylvania Pub. Util. Comm'n.*, 592 A.2d 797, 303 (Pa. Commw. 1991), (referring to SEPTA as a "state agency"), appeal denied by 611 A.2d 714 (Pa. 1992); *Southeastern Pa. Transp. Auth. v. Board for the Assessment and Revision of Taxes of Delaware County*, 319 A.2d 10, 12 (Pa. Commw. 1974) (calling SEPTA "an instrumentality of the Commonwealth"). Further, the Third Circuit has regarded SEPTA as a "Commonwealth party" for purposes of state sovereign immunity, *see Toombs v. Manning*, 835 F.2d 453 (3d Cir. 1987), and a political subdivision of the Commonwealth exempt under the Wagner and Taft Hartley Acts, *see Crilly v. Southeastern Pa. Transp. Auth.*, 529 F.2d 1355 (3d Cir. 1976). On the other hand, in denying Eleventh Amendment immunity to SEPTA, the Third Circuit recently noted that SEPTA has many characteristics unlike an arm of the state—such as separate corporate existence, the power to sue and enter contracts, and considerable funding from sources other than the Commonwealth. *Bolden v. Southeastern Pa. Transp. Auth.*, 953 F.2d 807, 820 (3d Cir. 1991) (en banc), *cert. denied*, _____U.S. _____, 112 S.Ct. 2281 (1992; *see also Scott v. Shapiro*, 339 A.2d 597 (Pa. Commw. 1975) (SEPTA not treated as Commonwealth agency within meaning of the jurisdictional provisions of Pennsylvania's sunshine laws).

In *New York, supra,* the Court indicated that the Federal Government's power to command state legislatures to legislate is limited by the Tenth Amendment's respect for state sovereignty. Observing that "the constitution has never been understood to confer upon Congress the ability to require the States to govern according to Congress' instructions," 112 S.Ct. at 2421, the Court struck down a portion of the Low-Level Radioactive Waste Policy Amendments of 1985 directing the States to either regulate radioactive waste disposal according to Congressional mandate or assume ownership of such waste and all liability that waste generators might incur due to the State's failure to follow the Congressional directive. Either "choice," the Court observed, "would 'commandeer' state governments into the service of federal regulatory purposes, and would for this reason be inconsistent with the Constitution's division of authority between federal and state governments." *Id.* at 2428. The Court concluded, "Whatever the outer limits of [a State's] sovereignty may be, one thing is clear: The Federal Government may not compel the States to enact or administer a federal regulatory program." *Id.* at 2435.

The PUC argues that Congress, by interfering with the Commonwealth's ability to apportion maintenance costs at rail-highway crossings, has, contrary to *New York,* attempted to use state regulatory machinery to advance federal goals. But the PUC reads too much into *New York.* That opinion does not hold that, whenever a state regulatory body is required to follow federal guidelines, there is a Tenth Amendment problem. Rather, *New York* stands for a much more limited proposition: that when Congress desires to regulate, it must do so directly and cannot enlist the states to do its bidding. However, §581(c)(5) does not employ the Commonwealth as a regulatory agency — i.e., does not compel the State to require or prohibit any acts — but merely directs the states to refrain from engaging in a certain form of regulation deemed inconsistent with cognizable federal interests. Even in the heyday of the Tenth Amendment, when *National League of Cities v. Usery,* 426

U.S. 833 (1976); was still good law,[12] the Court emphasized that

> the Federal Government may displace state regulation even though this serves to "curtail or prohibit the States' prerogatives to make legislative choices respecting subjects the States may consider important."

Federal Energy Regulatory Comm'n v. Mississippi, 456 U.S. 742, 759 (1982) (quoting *Hodel,* 452 U.S. at 290); *see also Hodel,* 452 U.S. at 292 ("It would . . . be a radical departure from long-established precedent for this Court to hold that the Tenth Amendment prohibits Congress from displacing state police power laws regulating private activity.") *Bethlehem Steel-Co. v. New York State Labor Relations Bd.,* 330 U.S. 767, 780 (1947) (Congress "can, if it chooses, entirely displace the States to the full extent of the far-reaching Commerce Clause . . . .") *Southern Pac. Co. v. Arizona,* 325 U.S. 761, 769 (1945) (Congress may "exclude state regulation even of matters of peculiarly local concern which nevertheless affect interstate commerce"). In *New York* itself, the Court reiterated that "[t]he constitution enables the Federal Government to pre-empt state regulation contrary to federal interests . . . ." 112 S.Ct. at 2435.[13]

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[12]In *National League of Cities,* a five-member majority of the Court — locating principles of state sovereignty in the Tenth Amendment — overrode Congressional legislation extending the federal minimum wage and maximum hour provisions to state-and municipal employees. Such federal legislation, the Court held, unduly displaced traditional state functions. Nine years later, in *Garcia, supra,* Justice Blackmun, who had voted with the *National League of Cities* majority, joined the four *National League of Cities* dissenters in reversing *National League of Cities.* The *Garcia* majority "reject[ed]; as unsound in principle and unworkable in practice, a rule of state immunity from federal regulation that turns on a judicial appraisal of whether a particular governmental function is 'integral' or 'traditional.' " 469 U.S. at 546-47.

[13]Congress' power to displace state regulation of railroads affecting interstate commerce has a particularly lengthy pedigree. *see, e.g.,*

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The fact that pre-emptive federal legislation may impinge on a state revenue-raising scheme has no special Tenth Amendment implications. Congress' authority to prohibit state taxation as an incident of the exercise of its delegated powers is well-entrenched— dating back, one might argue, to *McCulloch v. Maryland,* 17 U.S. (4 Wheat.) 316, 431 (1819), where Chief Justice Marshall, in holding that Maryland could not tax bank notes issued by the Baltimore branch of the Congressionally-chartered Second Bank of the United States, penned the memorable phrase "the power to tax involves the power to destroy."[14] What is true of Congress' delegated powers generally is specifically true of its commerce powers. *See Hooven & Allison Co. v. Evatt,* 324 U.S. 652, 679 (1945) ("Congress through the commerce clause, possesses the same power of control of state taxation of all merchandise moving in interstate or foreign commerce."); *Arizona v. Atchison. T. & S. Fe R.R.,* 656 F.2d 398, 407 (9th Cir. 1981) ("We know of no authority for the proposition that Congress may not interfere with

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Wabash. St. L. & Pac. Ry. Co. v. Illinois, 118 U.S. 557 (1886) (Congress can displace a State's power to regulate the interstate rates of railroads); *United States v Louisiana,* 290 U.S. 70 (1933) (same for intrastate rates); *Shreveport Rate Cases,* 234 U.S. 342 (1914). Moreover, even in the absence of conflicting federal legislation, the Commerce Clause of its own force has repeatedly been held to preclude state regulation of railroads. *See, e.g., Seaboard Air Line Ry. v. Blackwell,* 244 U.S. 310 (1917) (state could not require interstate railroad to stop at grade crossing because interference with interstate commerce outweighed local interest in safety); *Kansas City S. Ry. Co. v. Kaw Valley,* 233 U.S. 75 (1914) (despite valid local concerns, State lacks constitutional power to compel a railroad to remove a railroad bridge over which its interstate trains passed, given dominant requirements of interstate commerce); *See generally Southern Pac. Co.,* 325 U.S. at 780-81 (listing numerous cases in which local police-power legislation of interstate railroads was forced to yield to Interstate commerce interests).

[14]*McCulloch,* of course, is a case where Congress, in establishing the federal bank, had not expressly decreed that the bank's operation should be exempt from taxation, and the Court made that pre-emptive implication unaided by express statutory language based on the Supremacy Clause. *see supra* note 9.

state taxation in furtherance of its power over interstate commerce."): *Department of Revenue and Taxation v. National R.R. Passenger Corp.,* No. Civ. A. C82-0320-H, 1982 WL 1584 (D. Wyo. Dec. 15, 1982) ("Restricting the areas in which a state may exercise its taxing powers does not rise to the level of interference which would invalidate the congressional enactments."); *Arkansas-Best Freight Sys., Inc. v. Cochran,* 546 F. Supp. 904, 910 (M.D. Tenn. 1981) ("[T]he constitutional power of Congress under the commerce clause clearly permits some limitation on the states' power of taxation. As long as the legislation is rationally related to the goal of protecting interstate commerce or the instrumentalities thereof, the mere fact that a state taxation scheme is affected does not itself invalidate the legislation."); *cf. Moorman Mfg. Co. v. Bair,* 437 U.S. 267, 280 (1978) ("[The] legislative power granted to Congress by the Commerce Clause of the constitution would amply justify the enactment of legislation requiring all States to adhere to uniform rules for the division of income.").[15]

Therefore, it is clear that Congress can, in furtherance of its commerce power, displace state taxation and state police power regulation of private activity. However, the PUC, by stressing SEPTA's status as a public agency, suggests that §581(c)(5) is somehow more intrusive because it interferes with the Commonwealth's ability to structure and control its own sovereign operations. The problem with this argument is two-fold. First, even when the Court was invigorating the Tenth Amendment, in *National League of Cities,* the Court indicated that ownership or operation of an interstate railroad is not an integral part of a State's

[15]Indeed, the Commerce Clause, standing alone, imposes certain restrictions on the States' power to tax. *See, e.g., Freeman v. Hewit,* 329 U.S. 249, 252-53 (1946) ("[T]he Commerce Clause even without implementing legislation by Congress is a limitation upon the power of the states . . . [R]evenue serves as well no matter what its source. To deny to a State a particular source of income because it taxes the very process of interstate commerce does not impose a crippling limitation on a State's ability to carry on its local function.").

sovereign activities, *see* 426 U.S. at 854 n. 18,[16] thereby leaving intact a body of opinions affirming Congress' power under the Commerce Clause to displace state regulation of state-owned railroads engaged in interstate commerce, *see California v. Taylor*, 353 U.S. 553, 566-67 (1957) (Congress may supersede state labor laws that conflict with Congressional policy of promoting collective bargaining, even with respect to interstate railroads owned or operated by the State), *United States v. California*, 297 U.S. 175 (1936) (deciding that it is unimportant to determine whether a state-owned railroad is conducted by State in its sovereign or private capacity because state, by engaging in interstate rail commerce, subjects itself to Congress' commerce power therefore, state-owned railroad subject to federal safety standards).[17] Therefore, insofar as Congress can exempt a privately-owned interstate railroad from state taxation, provided there is some valid federal interest in doing so, it must have similar power over a state-controlled railroad because "there is no justification for a rule which would allow the states, by acquiring functions previously performed by the private sector, to erode federal authority in areas traditionally subject to federal statutory regula-

[16]*See* also *Transportation Union v. Long Island R.R. Co.*, 455 U.S. 678, 686 (1982) (emphasis in original) ("It is certainly true that some passenger railroads have come under state control in recent years, but that does not alter the historical reality that the operation of railroads is not among the functions *traditionally* performed by the state and local governments."): Moreover, the Court has also emphasized "the extended historical record of *federal* involvement in the field of rail transportation." *Garcia*, 469 U.S. at 540 (emphasis in original) (discussing *Long Island R.R.*).

[17]Nor, for that matter, as the discussion heretofore has suggested, is taxation of an instrumentality of interstate commerce an indisputable attribute of state sovereignty. *See Atchison*, 656 F.2d at 408 ("Power, including the power to tax, over instrumentalities of interstate commerce has not traditionally been limited to the states, and thus is not truly an integral part of state sovereignty.").

tion." *Transportation Union v. Long Island R.R. Co.*, 455 U.S. 678 687 (1982).[18]

In any event, the PUC's argument seems to rely an the so-called "traditional government functions" prong of the *National League of Cities* test that the court expressly rejected in *Garcia.*[19] Before *National League of Cities,* and again since its disavowal by the Court in *Garcia*, the Court has repeatedly allowed Congress to supersede a state's governance of its own enterprises: *e.g.,* forbidding a state government to provide salary and wage increases to its own employees, *Fry v. United States,* 421 U.S. 542 (1975): requiring a public mass transit authority, as well as state-run schools and hospitals, to adhere to federal minimum wage and overtime obligations, *Garcia v. San Antonio Metropolitan Transit Auth.,* 469 U.S. 528 (1985); *Maryland v. Wirtz,* 392 U.S. 183 (1968); prohibiting states from issuing bearer bonds, *South Carolina v. Baker*, 485 U.S. 505 (1988); and applying emergency price controls to state sales of lumber, *Case v. Bowles,* 327 U.S. 92 (1946). Therefore, even insofar as 581(c)(5) forces the Commonwealth to cede some control over a state instrumentality and its finances, this does not itself mean that §581(c)(5) unduly infringes on state sovereignty.

III.

The Applicability of Section 581(c)(5)

Section 581(c)(5) provides that:

> any commuter authority that could have contracted with Amtrak Commuter for the provision of commuter service but which elected to operate directly its own commuter service as of January 1, 1983, shall be

[18] *Cf. Helvering v. Powers,* 293 U.S. 214, 225 (1934) (upholding the application of a federal income tax on a state-operated commuter railroad because "the State cannot withdraw sources of revenue from the federal taxing power by engaging in businesses which constitute a departure from usual governmental functions and to which, by reason of their nature, the federal taxing power would normally extend").

[19] *See supra* note 12.

> exempt from the payment of any taxes or other fees to the same extent as [Amtrak] is exempt.

The defendant townships argue that §581(c)(5) does not prevent the PUC from allocating to SEPTA maintenance costs for the subject bridges because (1) SEPTA is not a "commuter authority that could have contracted with Amtrak Commuter," and (2) the costs in question are not "taxes or other fees."

A. The Potential to Contract with Amtrak Commuter

SEPTA, on March 24, 1982, issued a statement of intention to contract with Amtrak Commuter for the provision of commuter service; however, on September 22, 1982, the SEPTA Board of Directors voted to rescind that statement and undertake the provision of commuter services directly. While allowing that SEPTA is a "commuter authority" *see* 45 U.S.C. §502(8) (listing SEPTA as one of seven entities falling with the definition of "commuter authority"), the townships argue that SEPTA could not "have contracted with Amtrak commuter" because SEPTA Board members realized that to do so would have subjected SEPTA to certain increased labor costs that it could not have afforded. As support for this proposition, the townships rely on the following testimony from Robert J. Thompson, a former SEPTA Board member:

> To my recollection, the only reason, the compelling reason [for SEPTA] to go at it alone . . . with commuter service was the cost of complying with the work rules and [labor] contracts that were in existence. It was a dollar and cents cost. . . . [T]he only way that the elected officials and the SEPTA Board felt that they could afford to continue the service, a very valuable service, was to renegotiate the contracts and operate it ourselves.

Lower Merion's Mot. in Sup., Exh. C. at 16. From this testimony, defendants gather that "[t]he decision not to contract with Amtrak Commuter was not an independent election between two options, but rather the only alternative to

avoid crippling labor mandates and keep the commuter rail system afloat." Lower Merion's Mem. in Sup. at 16.

Defendants have provided no reason to believe that Congress intended the phrase "could have contracted with Amtrak Commuter" to eliminate from §581(c)(5)'s coverage some commuter authorities which instead assumed direct operation of commuter rail lines formerly handled by Conrail. By enacting §581(c)(5) in the wake of §546(b), Congress, in my view, intended to provide a tax-exempt status to any entity that, as of January 1, 1983, began directly to operate commuter rail operations formerly handled by Conrail, whether that entity was Amtrak Commuter or a local commuter authority. Therefore, the phrase "could have contracted with Amtrak Commuter for the provision of commuter service but which elected to operate directly its own commuter service" was designed to cover any commuter authority that was offered a chance to contract with Amtrak Commuter (i.e., "could have contracted with Amtrak Commuter") but proceeded to provide such service directly. This interpretation is consistent with the genesis of Amtrak Commuter, which was designed to assist local authorities in dealing with the newly-transferred commuter rail operations, and the fact that local authorities were offered a choice between contracting with Amtrak Commuter or operating these services themselves. After having granted Amtrak Commuter a tax exemption, Congress, through §581(c)(5), plainly desired to insure that no commuter rail authority would be penalized by declining to deal with Amtrak Commuter. To exclude from §581(c)(5) a commuter authority that was presented with the option of contracting with Amtrak Commuter but — for whatever reason — did not do so would be to defeat Congress' intention that local agencies operating Conrail's former lines stand on the same tax-exempt footing as Amtrak and Amtrak Commuter.

Even assuming, *arguendo*, that the phrase "could have contracted" was meant to excise from §581(c)(5)'s coverage some subset of commuter authorities which came to operate commuter service directly, it could only have been

designed to exclude those entities that, when presented with a choice to contract with Amtrak Commuter, simply could not have exercised that option. SEPTA did not encounter any legal or other formal constraint on its ability to contract with Amtrak Commuter. Rather, the testimony relied on by defendants at most demonstrates that SEPTA, having assessed the financial implications of contracting with Amtrak Commuter, determined that entering into such a contract would be too costly. *See* Upper Gwynedd's Mem. in Sup. at 6 ("The record indicates that SEPTA chose not to contract with Amtrak Commuter Services to operate SEPTA trains due to the fact that SEPTA could not financially afford" to so contract). (In fact, just months earlier, the SEPTA Board had decided precisely the opposite: that SEPTA had little choice but to contract with Amtrak commuter, *see infra* note 20.) Therefore, even on defendants' view, SEPTA, although presented with the opportunity to contract with Amtrak Commuter, and although it legally could have done so, rejected this option. That is to say, SEPTA, quite literally, "could have contracted with Amtrak Commuter for the provision of commuter service but . . . elected to operate directly its own commuter service." No language in §581(c)(5) compels the perverse conclusion urged by defendants that a commuter authority, lacking the financial resources to contract with Amtrak Commuter, for this reason loses a tax exemption.

In sum, I am not persuaded that Congress intended that the applicability of §581(c)(5) turn on a subjective — and ultimately unverifiable — *ex post* judicial determination as to whether it was financially feasible for any given commuter authority to contract with Amtrak Commuter, where such determination would, at the least, require a parsing of the particular finances of each commuter authority relying on §581(c)(5).[20] Therefore, because

[20]Were financial feasibility the issue, this fact-based inquiry could not be resolved by reliance on mere announcements of financial "impossibility." It is true, as defendants point out, that Mr. Thompson testified that at the September 1992 meeting "[t]here was unanimity among the

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SEPTA was presented with the option of contracting with Amtrak Commuter, and had the legal opportunity to do so, but ended up operating commuter service directly, it is covered by §581(c)(5).

B. "Taxes or Other Fees"

In *Amtrak I*, the Third Circuit determined that a special assessment on Amtrak to finance the replacement of a highway bridge traversing Amtrak's railway lines was a "tax or other fee" within the meaning of §546(b) and hence precluded by that legislation. Section 581(c)(5), as we have already seen, confers a tax immunity on commuter authorities like SEPTA "to the same extent as" Amtrak. As their last line of attack, the defendant townships present a number of arguments as to why the bridge-maintenance costs in these cases are not "taxes or other fees" within the meaning of §581(c)(5).[21] Many of these arguments were addressed in my previous opinion, wherein I concluded that, "just as the imposition of an assessment on Amtrak to finance the reconstruction of a bridge running over its

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members present that it would have been financially impossible for SEPTA to do anything but take over and operate the commuter rail system itself." Lower Merion's Mot. in Sup., Exh. C at 14 (as amended by attached affidavit of Mr. Thompson at ¶1). However, according to the minutes of the March 24, 1982 meeting — at which the Board expressed its intention to contract with Amtrak Commuter — various Board members, including Mr. Thompson himself, described in similar terms the necessity of doing precisely the opposite: contracting with Amtrak Commuter. *See* Lower Merion's Mot. in Sup., Exh. C. (entitled SEPTA Exhibit 1) ("Mr. Thompson, as Chairman of the Railroad Committee, said that he agreed that SEPTA had "little choice but to go with AMTRAK commuter.") *id.* (Mr. Girard-diCarlo said "that certain circumstances have occurred which, in his judgment, make it very difficult, if not impossible for SEPTA to proceed on its own."). This shift from the near impossibility of one option to the virtual impossibility of the other neatly demonstrates that what is "possible" is a fairly fluid — if not ineffable — concept, not lightly made a prerequisite of legal entitlement.

[21]The PUC does not, at least in any of its submissions at the summary judgment stage, dispute that the costs in question are "taxes or other fees."

tracks is a 'tax or other fee' under §546(b), so the allocation of maintenance responsibilities for the four bridges in question is — 'to the same extent' — a 'tax or other fee' within the meaning of §581(c)(5)." 802 F. Supp. at 1281 (footnote omitted). Hence, all attempts now to distinguish the costs in these cases from those imposed on Amtrak in *Amtrak I* fail.

Lower Merion posits that the costs assessed against SEPTA with respect to the Montgomery Avenue Bridge differ from the costs assessed against Amtrak in *Amtrak I* because, unlike Amtrak, "SEPTA derives a benefit from the existence of the Montgomery Avenue Bridge through the safe operation of trains under a roadway without any grade crossing." Lower Merion's Resp. to SEPTA's Mot. in Sup. at 3. Therefore, Lower Merion concludes that so long as the costs assessed to SEPTA do not exceed the benefits supplied to it, there has been no tax imposed on SEPTA. However, Lower Merion fails to explain why the maintenance of an overhead highway bridge benefits SEPTA any more than a reconstructed bridge traversing Amtrak's railway lines (designed to provide for both overhead vehicular and pedestrian traffic, *see* 665 F. Supp. at 404) stood to benefit Amtrak in *Amtrak I*.[22] In any event, even assum-

[22]Lower Merion urges two differences, neither of which, it seems to me, has much to do with comparative benefits. Lower Merion argues, first, that "[b]y contrast to the bridge in *Amtrak I*, the [Montgomery Avenue] Bridge is an existing overhead highway bridge that was reconstructed at no cost to SEPTA or SEPTA's predecessor." Lower Merion's Mem. in Sup. at 20. It is difficult to see why SEPTA benefits more from the existence of a bridge whose reconstruction it did not pay for than Amtrak benefits from the reconstruction and maintenance of a replacement bridge toward which, as a result of *Amtrak I*, it was not required to contribute. (Moreover, the district court in *Amtrak I* noted that the bridge, built in 1899-1900 by the Pennsylvania Railroad Company, "was maintained by Pennsylvania Railroad in the past. Amtrak, the present owner of the tracks, has not maintained the bridge on its own." 665 F. Supp. at 404.)

Second, Lower Merion argues that, unlike in *Amtrak I* (where a Commonwealth fund reimbursed the Township for costs imposed on it

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ing that allocation of costs to SEPTA, unlike those allocated to Amtrak, tracks the benefits received, the district court in *Amtrak I* expressly rejected the proposition now urged by Lower Merion: that insofar as costs imposed upon a property owner are designed to offset special benefits received from local improvements — i.e. if the cost is a "special assessment" (not a "general tax") — then no "tax or other fee" has been imposed. *see* 665 F. Supp. at 410 (noting that the general definition of the term "tax" — a forced contribution of wealth to meet public needs — "contains no basis for distinguishing between a general tax and a special assessment, nor would any reasonable common under-

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for reconstructing the bridge), there is no suggestion that state monies will be used to finance maintenance of the Montgomery Avenue bridge. Lower Merion thinks that this should make a difference because the Third Circuit in *Amtrak I* indicated that, due to *Illinois Central R.R. v. City of Decatur,* 147 U.S. 190 (1893), whether "expenditures for local improvements are financed solely by municipalities without assistance from the state legislature may be an element in determining whether special assessments qualify as a tax." 848 F.2d at 439. However, the Third Circuit went on to hold that, because 546b must be liberally construed given Amtrak's federal ties and Congress' broad intention, the distinction between state and local funding "is not implicated here." 848 F.2d at 440. Because SEPTA is exempt "to the same extent as" Amtrak, the distinction, similarly, is not relevant in the instant cases. Besides, as SEPTA points out, any attempt to draw a distinction between "state" taxes and "local" taxes on the strength of *Illinois Central* must deal with the fact that, in *Illinois Central,* the railroad was exempt merely "from all taxation under the laws of th[e] state," 147 U.S. at 190, whereas, under §546b and §581(c)(5), the exemption covers "taxes or other fees imposed by any State, political subdivision of a State, or local taxing authority . . . ."

Defendant Upper Gwynedd — which, unlike Lower Merion, does not expressly argue that a "tax" is imposed only so far as the costs outstrip the benefit received — raises a related argument: that SEPTA, as the owner of the Swedesford Road Bridge, "should be allocated the responsibilities that go with it as they do enjoy the benefits derived from it." Upper Gwynedd's Mem. in Sup. at 10. In my previous opinion denying defendants' motions to dismiss for lack of subject-matter jurisdiction and/or for failure to state a claim, I opined that the mere fact that a party has been held to own the bridge does not dispose of the question whether a "tax or other fee" is imposed when the owner is compelled to

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standing of the term in the context of this statute.").[23] The Third Circuit agreed that "taxes or other fees" extends to assessments for local improvements. Noting that an exemption from taxation usually does not apply to such special assessments, the court decided that the intention of the legislative body must govern, and, in §546b, Congress plainly intended to confer a broad "user fee" on state and local governments. The court concluded, "It would be manifestly inconsistent with that design to make Amtrak pay for related local improvements in the many instances

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maintain that bridge. There I wrote:

> A second possible factual difference [between the costs levied on SEPTA and on Amtrak] is that, with regard to three of the four bridges involved in the instant consolidated cases, the PUC made a formal finding that SEPTA owned the structure. The PUC concluded that the conveyance of the rights-of-way included, with it, ownership of the overhanging structures. While this pronouncement of ownership may deserve res judicata effect on that particular issue, *see National R.R. Passenger Corp.*, 665 F.Supp. at 407, it is another "distinction without a difference" for purposes of §581(c)(5). In *Amtrak I*, the district court determined, and the Third Circuit affirmed, that the allocation of bridge replacement costs was a "tax or other fee" without considering the question of ownership of the bridge or future ownership of the reconstructed bridge. The absence of discussion of bridge ownership suggests that this fact was not relevant to a characterization of the fee in question. (Indeed, the PUC itself, even in these consolidated cases, has allocated bridge maintenance costs to SEPTA where SEPTA was not the owner of the bridge; instead of stressing ownership of the bridge, the PUC, as in *Amtrak II*, has argued that the responsibility to maintain the bridge runs with ownership of the tracks beneath it.) Moreover, SEPTA — which evidently perceived no net benefit in bridge ownership — opposed any determination that it owned the various bridges. It would be inappropriate to hinge the scope of a federal tax immunity on a formal state declaration lacking any relevant effect on the underlying equities.

802 F. Supp. at 1281 n. 13.

[23]Certain language in *National Railroad Passenger Corporation v. Pennsylvania*, No. Civ. A. 86-8357, 1991 WL 998 (E.D. Pa. Jan. 2, 1991) *(Amtrak II)*, does not disturb my conclusion that the district court in *Amtrak I* determined that an entity is subject to a "tax or other fee"

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where the states could, and would, impose them." 848 F.2d at 440. It is true that the Third Circuit liberally construed Amtrak's tax exemption in part because of Amtrak's federal ties and the rule that the federal government's tax immunity is broadly interpreted. Although, as defendants repeatedly stress, SEPTA does not share Amtrak's quasi-federal status, it does, by virtue of §581(c)(5)'s plain language, share Amtrak's tax exemption;[24] therefore, there is simply no warrant for construing the "taxes or other fees" covered by §581(c)(5) more narrowly than those covered by §546b due to a difference in status that Congress saw fit to ignore. Therefore, I remain convinced that the costs in question in these consolidated cases are, as a matter of law, "taxes or other fees" under §581(c)(5).

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within the meaning of §546b even if the exaction is designed to offset a benefit from local improvement. In *Amtrak II* — where the district court was asked to enforce its order in *Amtrak I* enjoining the PUC from assessing Amtrak for maintenance costs of the subject bridge — the question was whether the order in *Amtrak I* precluded the PUC not only from imposing an assessment on SEPTA for construction of a new bridge (the proposed course in *Amtrak I*), but also from imposing an assessment for maintenance of the existing bridge (the PUC having decide to repair rather than replace the existing bridge). The court decided that both "special assessments" violated §546b and the court's previous order: The court then went on to note that Amtrak would derive no benefit from maintaining the existing bridge (which apparently was now purely designed for pedestrian traffic) and Amtrak should not have to foot the bill for entirely local concerns. *See* 1991 WL 998 at * 2-3. I do not read this discussion, suggesting that Amtrak should not be forced to pay for local concerns from which it does not benefit, to embrace the inverse proposition: that, consistently with §546b, Amtrak can be compelled to pay for local improvements provided it benefits from them. Such a rule, it seems to me, would flatly contradict the articulated position of the district court in *Amtrak I* that "special assessments" — which are imposed precisely on the assumption that a particular entity has received particular benefits from a given local improvement — are also "taxes or other fees."

[24]In fact, Amtrak's tax exemption was broadly construed partly because, as the Third Circuit observed, a House Report accompanying §546b indicated that Amtrak was to be exempted from all state and local

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IV.

Conclusion

Section 581(c)(5) — a constitutional exercise of Congress' commerce power — entitles local commuter authorities that could have contracted with Amtrak Commuter for provision of commuter service but elected to provide that service themselves to the same tax exemption afforded Amtrak and Amtrak Commuter. SEPTA, which proceeded to operate its own commuter rail service instead of contracting with Amtrak Commuter for provision of that service, has a tax-exempt status under §581(c)(5). Because Amtrak's tax exemption has been interpreted to extend to assessments for maintaining or improving bridge structures that pass over Amtrak's railway lines, and because there is no basis for concluding that SEPTA is entitled to a lesser immunity from the similar assessments in these cases, the PUC will be enjoined from allocating such costs against SEPTA with respect to the four subject bridges that pass over SEPTA's railway lines.

An appropriate order follows.

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taxes " 'to the same extent as the United States is exempt.' " 848 F.2d at 440 (citation omitted). By the same token — and even more so when the asserted equivalence is part of the text of the statute itself — SEPTA is entitled to the same broad tax immunity as Amtrak because, by virtue of §581(c)(5), it is exempt "to the same extent as" Amtrak.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Southeastern Pennsylvania Transportation Authority	:	Civ. No. 92-0112
v.	:	
Pennsylvania Public Utility Commission and Township of Lower Merion	:	

Southeastern Pennsylvania Transportation Authority	:	Civ. No. 92-1029
v.	:	
Pennsylvania Public Utility Commission and Township of Upper Gwynedd	:	

Southeastern Pennsylvania Transportation Authority	:	Civ. No. 92-3793
v.	:	
Pennsylvania Public Utility Commission	:	

ORDER

For the reasons given in the accompanying opinion, it is hereby ORDERED and DIRECTED that:

1. the motions for summary judgment submitted by

defendants Public Utility Commission, Township of Lower Merion, and Township of Upper Gwynedd are DENIED;

2. the motions for summary judgment submitted by plaintiff Southeastern Pennsylvania Transportation Authority("SEPTA") are GRANTED, and judgment is entered in favor of SEPTA with respect to each of these three consolidated cases;

3. any assignment of costs to SEPTA by order of defendant Pennsylvania Public Utility Commission ("PUC") for costs associated with design, construction, maintenance, inspection, or repair of

a. the Montgomery Avenue bridge structure, substructure or associated stairway as identified in the PUC Opinion and Order entered December 10, 1991

b. the Swedesford Road bridge structure, substructure or superstructure as identified in the PUC Opinion and Order adopted July 16, 1991 and entered January 21, 1992, and

c. the Johnson Avenue and the Willow Grove Avenue bridge structures as identified in the PUC Opinions and Orders issued June 2, 1992,

violates 45 U.S.C. §§581(c)(5) and 546b as a tax or other fee levied upon SEPTA; and

4. defendants are permanently enjoined from assessing such tax or other fee regarding the foregoing bridges, or enforcing the foregoing orders of the PUC against SEPTA.

June 29, 1993

/s/ Louis H. Pollak

Pollak J.

Supreme Court, U.S.
FILED
SEP 6 1994
OFFICE OF THE CLERK

No. 94-223

In The

Supreme Court of the United States

October Term, 1994

PENNSYLVANIA PUBLIC UTILITY COMMISSION,

Petitioner,

vs.

SOUTHEASTERN PENNSYLVANIA TRANSPORTATION AUTHORITY,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

BRIEF IN OPPOSITION

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RESTATEMENT OF THE QUESTION PRESENTED

Did the Court of Appeals err in affirming the District Court's decision to treat the exemption from taxes and fees given to the Southeastern Pennsylvania Transportation Authority ("SEPTA") in 45 U.S.C. § 581(c)(5) as identical to the exemption from taxes and fees previously given by Congress to the National Railroad Passenger Corporation ("Amtrak")?

LIST OF PARTIES

The parties to all of the proceedings below were the petitioner, Pennsylvania Public Utility Commission, and the respondent, SEPTA. The Township of Upper Gwynedd was a defendant in one of the consolidated cases. The Township of Lower Merion was a defendant in another. Upper Gwynedd was an appellant in the Court of Appeals. Lower Merion was not.

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No. 94-223

In The

Supreme Court of the United States

October Term, 1994

PENNSYLVANIA PUBLIC UTILITY COMMISSION,

Petitioner,

vs.

SOUTHEASTERN PENNSYLVANIA TRANSPORTATION AUTHORITY,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

BRIEF IN OPPOSITION

OPINIONS BELOW, JURISDICTION AND STATUTES INVOLVED

Respondent agrees that petitioners' recitation of the text of 45 U.S.C. § 581(c)(5) is accurate and that the jurisdiction of this Court is correctly stated. The opinions attached to the petition are also correct. The opinion of the Court of Appeals has not been published and has been marked as "Not For Publication." The two opinions of the District Court (Pollak, J.) have been published at 802 F. Supp. 1273 and 826 F. Supp. 1506. These opinions are referred to herein as "Pollak I" and "Pollak II," respectively, with citation made to the applicable pages as printed in the Petition.

STATEMENT OF THE CASE

The District Court's opinions include an accurate (and, for the most part, undisputed) recitation of the facts germane to the issues presented in these cases. *See* Pollak I, 11a-13a; Pollak II, 33a-37a. Rather than repeating what has already been said, SEPTA will summarize the factual background only briefly, concentrating on the political and legal context from which this dispute has arisen.

Public highways and railroad tracks cross each other in hundreds of places throughout Pennsylvania. Often these crossings are handled by means of a bridge: either a railroad bridge (which carries the track over the road) or a highway bridge (which carries the road over the track). Years ago, when a few great private railroads dominated much of Pennsylvania's commerce, the railroads not only maintained all the railroad bridges (as they had to if the trains were to make any use of them), they sometimes contributed to the maintenance of highway bridges. Other contributors, of course, were the highway authorities charged with making sure that automobiles could make use of those bridges.[1]

Unfortunately, the great railroads of the last century have now gone bankrupt. Moreover, the public authorities responsible for maintaining the highways are themselves short of funds. Given this shortage of money – and the high cost of maintaining an aging transportation

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[1] Depending on the classification of a given road, the highway authority charged with its maintenance and repair could be a Commonwealth agency (*e.g.*, the Pennsylvania Department of Transportation) or a local government unit (*e.g.*, a city or township).

infrastructure – the various public entities responsible for bridges have naturally focused on means of avoiding or transferring expense. Possible targets for bearing at least some of the costs associated with highway bridges were the successors of the railroads. One such successor is the National Railroad Passenger Corporation ("Amtrak"). Another is the Southeastern Pennsylvania Transportation Authority ("SEPTA").

In 1982, the Pennsylvania Public Utility Commission ("PUC") began a series of investigations to assign maintenance and repair responsibilities for all of the bridges in Pennsylvania carrying highways over railroad tracks. Thereafter, the PUC tried, in several cases, to assign a portion of this responsibility to Amtrak and/or to SEPTA. In 1987, Amtrak responded to one such PUC directive by filing a complaint in the federal court invoking 45 U.S.C. § 546b, which exempts Amtrak "from any taxes or other fees imposed by any State, political subdivision of a State or local taxing authority." Amtrak's lawyers argued that the PUC's imposition on Amtrak of new maintenance and repair obligations with respect to highway bridges was, in effect, the imposition of a "tax or other fee" – the very thing that Congress had prohibited when it passed § 546b in 1981.

Amtrak's argument proved persuasive, first to the United States District Court for the Eastern District of Pennsylvania and then to the Court of Appeals for the Third Circuit. *See National Railroad Passenger Corp. v. Pennsylvania P.U.C.*, 665 F. Supp. 402 (E.D. Pa. 1987), *aff'd*, 848 F.2d 436 (3d Cir.), *cert. denied*, 488 U.S. 893 (1988) (*Amtrak I*). As a result, the PUC was permanently

enjoined from attempting to impose maintenance and repair costs for these highway bridges on Amtrak.

Amtrak's success, of course, originally meant little to SEPTA because the statutory exemption from "taxes and other fees" had been granted only to Amtrak. In 1988, however, Congress extended an identical exemption from "taxes or other fees" to seven different rail commuter authorities. 45 U.S.C. § 581(c)(5). SEPTA was one of those seven transit authorities. As one might expect, SEPTA promptly argued in the various ongoing PUC hearings relating to the costs associated with highway bridges that the PUC could no more impose maintenance and repair responsibilities on SEPTA than it could impose such responsibilities on Amtrak. Inasmuch as Amtrak had been held to be exempt from the imposition of such costs, so too, SEPTA reasoned, was SEPTA.

Unfortunately, neither the PUC, nor Pennsylvania's Commonwealth Court, agreed with SEPTA.[2] Unexpectedly, they took the view that the Court of Appeals' construction of Amtrak's exemption under § 546b was neither binding upon them nor, indeed, persuasive. In the PUC's view, maintenance and repair obligations were *not* "taxes or other fees" and the Court of Appeals had simply got it wrong when it held to the contrary. Although the PUC was obviously unprepared to defy the existing

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[2] The Commonwealth Court is an intermediate appellate court of defined jurisdiction. It hears all appeals from Commonwealth agency determinations. The PUC, of course, is such an agency. The Commonwealth Court's endorsement of the PUC's position with respect to SEPTA may be found at *SEPTA v. Pennsylvania P.U.C.*, 592 A.2d 797 (Pa. Cmwlth. 1993).

injunction against imposing maintenance and repair costs on Amtrak,[3] it was prepared to try to impose the very same kind of costs *on SEPTA*, as to which no injunction was yet in place.

Given the PUC's intransigence – and the Commonwealth Court's acquiescence in that intransigence – it came as no surprise when SEPTA did the same thing Amtrak had done five years earlier. After the very next group of highway bridge cases was decided by the PUC, SEPTA promptly asked for declaratory and injunctive relief from the United States District Court for the Eastern District of Pennsylvania.[4] Inasmuch as SEPTA's exemption is *by definition* exactly the same as Amtrak's exemption,[5] SEPTA relied upon the decision in *Amtrak I* and argued that that holding should be deemed dispositive of the legal questions presented. That this was so, of course, was less a matter of legal reasoning than it was simple arithmetic: SEPTA knew that if A = zero and S = A then S = zero.[6]

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[3] The PUC had originally attempted to take such a course with Amtrak. Its conduct met with a firm rebuff, however, in *National Railroad Passenger Corporation v. Commonwealth of Pennsylvania*, No. Civ. A. 86-8357, 1991 WL 998 (E.D. Pa. Jan. 2, 1991) (*Amtrak II*).

[4] SEPTA also filed protective appeals in the Commonwealth Court, which, when advised that SEPTA had sought relief in the federal court, stayed all further state court proceedings. Pollak II, 40a-41a.

[5] 45 U.S.C. § 581(c)(5) unambiguously exempts commuter authorities from taxes and other fees "to the same extent" as Amtrak is exempted.

[6] For purposes of the arithmetical proof, A is Amtrak, S is SEPTA, and zero is the amount each must pay on the maintenance and repair of highway bridges. A = zero because of the

Given this arithmetical proof, the principal arguments made below had less to do with SEPTA's legal right to the exemption than with the proposition that even if Congress had exempted SEPTA from paying the repair and maintenance costs associated with highway bridges, the federal courts were nevertheless powerless to protect SEPTA. This was said to be so for several reasons – the Tax Injunction Act, the Eleventh Amendment, abstention, etc. Although the legal doctrines invoked are several, the argument remains the same: even if Congress gave SEPTA a federally protected right, it gave it no federal remedy. Judge Pollak rejected this argument. So did the Court of Appeals.

REASONS FOR DENYING THE WRIT

The Petition advances three reasons for granting the writ: (1) a supposed "conflict" between the Court of Appeals and Pennsylvania's Commonwealth Court; (2) the purported unconstitutionality of 45 U.S.C. § 581(c)(5) on account of the Tenth Amendment and (3) an alleged "inconsistency" between certain opinions of this Court and the lower courts' resolution of the Tax Injunction Act/Eleventh Amendment Issue.[7] In SEPTA's view the

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Court of Appeal's holding in *Amtrak I*; S = A because S is defined as A in 45 U.S.C. § 581(c)(5); it follows that S = Zero. Q.E.D.

[7] Given the rationale given by the lower court – to wit, a clear and manifest intention on the part of Congress – the resolution of the Tax Injunction Act and Eleventh Amendment issues is essentially the same. Related abstention arguments that

order in which these issues have been presented is confusing. The third issue received all the attention below; the second received very little; and the first is, at least in some respects, a misnomer. Accordingly, SEPTA respectfully suggests that the reasons for denying the writ are really two: (1) 45 U.S.C. § 581(c)(5) is a plainly constitutional exercise of Congress' power under the Commerce Clause and (2) the lower courts' resolution of the Tax Injunction Act/Eleventh Amendment Issue is not only consistent with the previous opinions of this Court, it is correct. On these two issues, as it happens, there is no conflict between the Court of Appeals and any other court, state or federal. The third reason for denying the petition, which is discussed last, is that the supposed "conflict" that the PUC raises in its petition, whatever it may be, does not constitute a persuasive reason for granting the writ.

I. 45 U.S.C. § 581(c)(5) Is Not In Conflict With the Tenth Amendment

The constitutional argument now advanced by the PUC was *not* the principal argument it pressed below. Still, the issue was raised and was addressed by Judge Pollak. *See* Pollak II at 47a-55a. The Court of Appeals merely endorsed Judge Pollak's opinion on this point, confining its own opinion to what it considered to be the "most difficult issue", the applicability of the Tax Injunction Act. *See* 5a.

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were pressed below do not appear to have been included in the Petition.

While the "difficulty" of any given question will always depend, one way or the other, on the person who must answer it, the PUC's constitutional challenge to § 581(c)(5) can be easily answered. At issue in this case is the maintenance and repair responsibility for highway bridges that run over railroad tracks. SEPTA's alleged obligation to pay such fees arises out of its operation of a railroad. The railroad that SEPTA operates – although fairly described as a commuter rail network – is plainly in interstate commerce; indeed SEPTA itself operates trains in New Jersey and Delaware. SEPTA is operating such trains because the private railroads that once operated them went bankrupt and thereafter became subject to a comprehensive rail reorganization by Congress. As part of an inducement to SEPTA and other local transit authorities to operate commuter rail service directly – as opposed to contracting with Amtrak Commuter to provide the service – Congress decided to exempt the authorities from taxes and other fees to the same extent as it had previously exempted Amtrak. Congress' power to do this under the Commerce Clause cannot seriously be questioned.

How or why any of this would violate the Tenth Amendment is a bit of mystery. This is not a case in which the federal government has sought "to commandeer" a state's regulatory authorities in order to administer a federal statute, nor is it a case in which Congress has otherwise tried to force a state to govern according to its instructions. *See New York v. United States*, ___ U.S. ___, 112 S. Ct. 2408 (1992). On the contrary, it is a case in which Congress has prohibited a state from doing something inconsistent with Congress' own regulatory

scheme. As Judge Pollak noted, where Congress is acting pursuant to its power to regulate interstate commerce, it has the power to displace the states entirely if it chooses to do so. *See* Pollak II at 51a-53a. While it is true that the Tenth Amendment has had its zigs and zags in recent years, holding that it prevents Congress from regulating railroads would be a u-turn of startling proportions.

II. The Statutory Scheme of 45 U.S.C. §§ 546b and 581(c)(5) Is Such That Congress' Intention Is Clear and Federal Relief Is Not Barred By the Tax Injunction Act, 28 U.S.C. § 1341 or the Eleventh Amendment

There being no doubt that SEPTA has the same exemption as Amtrak, and the scope of that exemption having already been established in *Amtrak I*, the "difficult" question presented below was: if SEPTA is exempted from paying these costs, and if the PUC chooses to impose them anyway, is there anything that a federal court can do about it? While the arguments on this issue are quite interesting as a jurisprudential exercise, it is more than clear that the only practical answer – as well as the legally sounder answer – is yes.

The argument that the PUC pressed most strongly below was that SEPTA's case was barred by the Tax Injunction Act, 28 U.S.C. § 1341. This argument (in contrast to some others) was not foreclosed by the Court of Appeals' opinion in *Amtrak I* because the language of 45 U.S.C. § 546b differs from that used in 45 U.S.C. § 581(c)(5). Whereas § 546b specifically defines the tax exemption and the right to vindicate that exemption by

resorting to the federal courts, § 581(c)(5) says only that commuter authorities are to have whatever exemption Amtrak has. It was thus possible to argue from the statutory language that while Congress may have given SEPTA the same *substantive* rights as it gave Amtrak, it gave only Amtrak, and not SEPTA, the remedy needed to enforce that right.

The District Court rejected this narrow reading of 45 U.S.C. § 581(c)(5) when it denied the PUC's motion to dismiss. Pollak I, 21a-27a. While the Court recognized that any congressional authorization to abrogate § 1341 in a given case (or class of cases) must be "clear," it also recognized that Congress is not required to write out any "magic words" in order to manifest its intent. Pollak I, 22a & n.15. On the contrary, where it makes sense in the context of a broad statutory scheme, courts can find – and have found – clear and unambiguous congressional intent to override § 1341, even in cases where that statute is not even mentioned.[8]

In this case, of course § 1341 is plainly abrogated in one part of the statute (45 U.S.C. § 546b) and the question is whether Congress, when it extended the substantive rights granted in that statute to certain commuter authorities, meant to extend the remedy as well. Judge Pollak concluded that no other construction was defensible:

> It makes no sense to conclude that Congress designed § 581(c)(5) to be enforced exclusively in the state courts. That provision does not merely confer federal Tax immunity upon commuter authorities: it confers upon any commuter

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[8] Pollak I, 23a (citing cases).

> authority that could have contracted with Amtrak for local rail service the same favored tax position as Amtrak so that such an entity is not penalized by its decision to operate commuter rail service directly. It would be manifestly inconsistent with that design to limit SEPTA's legal remedies to state courts, which might, as has proven true here, more narrowly construe the federal tax immunity.
>
> Moreover, reading § 581(c)(5) as an exception to the Tax Injunction Act does not frustrate the underlying purposes of the Act. § 1341 is designed to preserve from judicial interference "the imperative need of a State to administer its own fiscal affairs," *Tully v. Griffin*, 429 U.S. 68, 73 (1976), but here *Congress itself* has denied fiscal autonomy insofar as the state seeks to impose certain taxes on commuter authorities. The existence of a federally-created tax immunity distinguishes the taxes at bar from situations where the courts have refused to imply exceptions to § 1341 based on the mere existence of a general federal right of action or a general jurisdictional statute that does not specifically pertain to state taxation. . . . Where congressional interference with state fiscal autonomy is so clear and unequivocal, particular concern about federal *judicial* interference with state revenue collection is less justified.

Pollak I, 25a-27a (emphasis in original) (citations omitted).

The District Court, in other words, found the requisite congressional intent simply by analyzing what it is that Congress was doing. It is true that § 581(c)(5) does not repeat that statute word for word, but chooses

instead to exempt SEPTA "to the same extent" as Amtrak is exempt. To understand the scope of Amtrak's exemption, however, the reader must, by definition, resort to 45 U.S.C. § 546b. The right to protect the exemption by resorting to federal court is expressly granted in § 546b and is an integral part of the protection given to Amtrak in 1982. Congress' shorthand incorporation of this protection in § 581(c)(5) neither specifically includes nor specifically excludes the last sentence of § 546(b); but the only way the statutory scheme makes any sense is to read the incorporation as inclusive of *all* of Amtrak's exemption, including the right to enforce it. Otherwise, the equalization envisioned by Congress is lost, and SEPTA will be left bearing costs arising out of the commuter rail service that it took over in the 1980s, which costs would *not* have been borne by Amtrak Commuter had that entity operated the same commuter rail service. That, of course, is exactly what § 581(c)(5) was designed to avoid.[9]

It might be argued, of course, that Congress left the task of enforcing the tax exemption to others and that SEPTA can always look to the state courts for appropriate protection of its federally created rights. Whatever the merit of this idea in terms of post-Federalist political or jurisprudential theory, it is (or at least was) factually false. If there was one certainty in this case – at least prior

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[9] It should be added that this point is in no sense rhetorical. The PUC has taken the position in at least two other bridge cases that because Amtrak has been held to be exempt, SEPTA must pay more than it (SEPTA) would otherwise pay in order to help absorb Amtrak's share.

to the District Court's hearing it[10] – it was that SEPTA could *not* look to the state courts for any remedy at all. The PUC and the Commonwealth Court made it clear that the courts of Pennsylvania, at least, did *not* intend to respect the right and would not afford SEPTA any remedy. *See SEPTA v. Pennsylvania P.U.C.*, 140 Pa. Comm. Ct. 270, 282, 592 A.2d 797, 803 (Pa. Cmwlth. 1991), *appeal denied*, 611 A.2d 714 (1992) (announcing "fundamental differences" with the Third Circuit's analysis of the scope of § 546b).[11] It follows that if the District Court had adopted the PUC's narrow construction of § 581(c)(5), thereby severing the remedy given in § 546b from the right given in the same paragraph, the right itself would have been lost along with the remedy.

In contrast, if this Court leaves undisturbed the more inclusive construction adopted below, thereby treating § 581(c)(5) as putting SEPTA in Amtrak's shoes as those shoes are cobbled in § 546b, then SEPTA's commuter rail activities will be exempt from taxes and fees to the same extent as Amtrak is (or would have been had it been

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[10] Interestingly enough, once SEPTA took its case to federal court, the Commonwealth Court stayed the state court proceedings pending resolution of SEPTA's federal case. Pollak II, 40a-41a. Thus, although the futility of any effort to seek to vindicate SEPTA's right in state court was evident before the District Court ruled, the Commonwealth Court has done nothing yet to suggest that it would not defy the federal court's ruling on this subject once it was made.

[11] Ironically, the Pennsylvania court's refusal to recognize SEPTA's federally created right rests on the ground that the charges of which SEPTA complains do *not* constitute taxes or fees. Pollak II, 43a-44a n.8. If that were so, of course, 28 U.S.C. § 1341 would not apply.

operating the same commuter rail services). It is only this latter construction that is in accord with the intent of Congress when it passed § 581(c)(5). The construction urged by the PUC, in contrast, would have the practical consequence of repealing the statute, at least insofar as it covers highway bridges that cross railroads in Pennsylvania. What Congress clearly intended to treat the *same* would, in fact, be treated differently. The preferable construction, given the manifest purpose of the statute, is clear.

The PUC also raised the Eleventh Amendment as a bar to SEPTA's suit against it. The PUC's right to invoke Eleventh Amendment protection is itself questionable, *see* Pollak I, 28a-29a n.21, but even assuming that the PUC *could* invoke the Amendment in an appropriate case, it obviously has no such defense in a case where Congress has abrogated the immunity. *See Atascadero State Hospital v. Scanlon*, 473 U.S. 234 (1985). It follows that the PUC's Eleventh Amendment argument is no stronger (indeed perhaps a bit weaker) than its argument under 28 U.S.C. § 1341. In each case, the supposed bar may be overcome by the clearly expressed intention of Congress and, as the District Court rightly found, that clearly expressed intention is present here. *See* Pollak I, 27a-29a; Pollak II, 36a n.4.

III. The Supposed "Conflict" Between Pennsylvania's Commonwealth Court and the Court of Appeals is Not a Reason For Granting the Writ.

Given the constitutionality of the statute and the manifest need for federal court relief to vindicate the

congressional purpose in passing it, it is clear that the courts below were right in their resolution of the issues raised by the PUC in these cases. Nevertheless, the PUC suggests that it is now caught in some kind of "conflict" as a result of the Court of Appeals' decision. The supposed "conflict," however, is more accurately described as a disagreement about the previous decision of the Court of Appeals in the *Amtrak* case. It is not a "conflict" over any of the issues discussed above and, more to the point, it creates no uncertainty or confusion with respect to what these parties – or anyone else – can or must do under the law.

That the PUC is obliged to respect a federal injunction is not particularly surprising, and certainly is a proposition that will not surprise the PUC. It has some experience in this regard. Six years ago, this Court denied the PUC's petition for a writ of certiorari to the Court of Appeals for the Third Circuit after that court had affirmed the decision reached by the District Court in *Amtrak I*. Thereafter, the PUC took the position that that case applied only to its own precise facts and continued in its efforts to impose some other maintenance and repair expenses on Amtrak. Amtrak was obliged to go back to court – in *Amtrak II* – to make it clear that the federal statute would be applied consistently, and in every case. *See National Railroad Passenger Corporation v. Commonwealth of Pennsylvania*, No. Civ. A. 86-8357, 1991 WL 998 (E.D. Pa. Jan. 2, 1991) (*Amtrak II*). The District Court's decision in that case was unambiguous:

> It is well accepted that person bound by an injunctive order of a court must obey the order's command. [citation omitted] Moreover, state

> and local officials, commissions, departments, agencies and the like may be compelled to abide by injunctive orders issued by a court. [citation omitted] Federal courts "are not reduced to issuing injunctions against state officers and hoping for compliance. Once issued, an injunction may be enforced." *Hutto v. Finney*, 437 U.S. 678, 690, 98 S.Ct. 2565, 2573 (1978).

Id. at *3. The PUC, in other words, was bound by the District Court's previous order.[12]

It is certainly fair to say that the PUC – and, indeed Pennsylvania's Commonwealth Court – think that the *Amtrak* cases were wrongly decided. That is a good faith disagreement on the law. But it is not a "conflict" in the sense that there is any uncertainty or confusion about what the law is or how the PUC must act in light of that law. Amtrak is exempt from paying the expenses that the PUC sought to impose upon it. A federal court has enjoined the PUC from trying to do what federal law forbids. The PUC is a disappointed litigant, to be sure, but its disappointment does not create a "conflict" of the type normally brought to this Court.

When – in 1988 – Congress afforded SEPTA (and certain other commuter authorities) an exemption from taxes and fees that was by its terms *identical* to Amtrak's exemption, it was inevitable that SEPTA would ask to be treated the same way Amtrak is treated. The PUC's refusal to do so reflects, at least in part, its continuing

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[12] That the court did not consider this question to be a close one is also clear from its order, which required the PUC to pay the attorneys' fees Amtrak incurred in contesting the PUC's post injunction efforts to impose costs on Amtrak.

disagreement with the substance of the *Amtrak* decisions. When the matter was taken to the Commonwealth Court, it is entirely true that that court cited "fundamental differences" it had with the Third Circuit, and noted that it would have decided the Amtrak cases differently:

> We disagree with the Third Circuit that a special assessment is a tax. Under Pennsylvania law, special assessments for linear improvements are made on the basis of who receives the benefits. An assessment cannot be imposed on property not in fact receiving a benefit. It is a burden or benefit one bears or receives incidental to one's ownership of land, not a tax or fee to support the public welfare. [citation omitted]

See PUC v. SEPTA, 592 A.2d at 803 n.12. The Commonwealth Court did not say, however, that it, or the PUC, would defy a federal court injunction vindicating the exemption. And, when SEPTA went to federal court to obtain such relief, the Commonwealth Court promptly stayed the state proceedings on the topic, pending resolution of SEPTA's federal claim.

Insofar as a conflict does exist, then, what is it about? There is certainly no "conflict" between the Court of Appeals and the Commonwealth Court over whether the Tax Injunction Act applies. Both agree that it does not: the Court of Appeals because of a Congressional decision to override the Act; the Commonwealth Court because it does not consider the maintenance and repair obligations to be "taxes" sufficient to trigger the Act. Nor is there any "conflict" about the applicability of the Tenth or Eleventh amendments. In fact, the only real "conflict" is about the merits not of this case but of *Amtrak I*. But if the PUC is

free, as it surely is, to believe *that* case was wrongly decided, it is not free – as *Amtrak II* makes abundantly clear – to behave as if it didn't exist. So here, as in *Amtrak*, if the PUC defied the injunction by confirming to issue orders imposing maintenance and repair costs on SEPTA, SEPTA would be obliged to seek a further order from the Court below. That is not a "conflict"; it is the rule of law.

Finally, it bears mention that if matters had been left in the state they were in *before* Judge Pollak issued his injunction, a real "conflict" would have come into play. Notwithstanding the clear language of 45 U.S.C. § 581(c)(5), SEPTA's exemption from "taxes and other fees" would have been very different in its scope than the exemption afforded to Amtrak. Moreover, the difference would have arisen solely out of a refusal by the Pennsylvania Courts to follow the construction of a federal statute previously advanced by the Court of Appeals. All that has happened as a result of Judge Pollak's decision, however, is that SEPTA has been afforded the same exemption from taxes and fees as Amtrak. That this is what Congress intended is obvious from the clear language of § 581(c)(5).

The only real disagreement is, and always has been, whether the kind of maintenance and repair expenses at issue in these bridge cases should be deemed "taxes and other fees" within the meaning of the original exemption given Amtrak in 1982. This question was the subject of the *Amtrak* cases and was decided in 1988. There continues to be a difference of opinion about the merit of that decision but there is no "conflict" or confusion about it. It is true, of course, that this Court can choose to hear this case if it wishes to examine the meaning of the words

"taxes and other fees" as those terms are argued in 45 U.S.C. § 546b. It is not true, however, that there is genuine "conflict" that this Court now needs to "resolve" with respect to either § 546b or § 581(c)(5).

CONCLUSION

The PUC's zeal in finding alternative sources of funds for the maintenance and repair of Pennsylvania highway bridges is admirable. Certainly SEPTA would be grateful for any alternative sources of funds for the maintenance and repair of the many railroad bridges that it needs to maintain if it is going to operate the rail service it agreed to take over, at Congress' invitation, several years ago. In the present case, however, the PUC is overreaching and the lower courts' resolution of its dispute with SEPTA about assessments for highway bridges need not, and should not, be disturbed.

Respectfully submitted,

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